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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XXXVII.

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AMERICAN STATE REPORTS.

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AMERICAN STATE REPORTS.
VOL XXXVII.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

CONLIN v. BOARD OF SUPERVISORS.

[99 CALIFORNIA, 17.]

CONSTITUTIONAL LAW.—IN PASSING UPON THE CONSTITUTIONALITY OF A STATUTE, the court must confine itself to the consideration of those matters which appear upon the face of the law and those facts of which it can take judicial notice. Therefore if a statute attempts to authorize the payment of moneys to a street contractor for work for which he has not been able to obtain compensation, because of errors, omissions, and irregularities of municipal officers in their official proceedings connected with such work, the court is not authorized to take evidence and make findings to ascertain what errors, omissions, and irregularities are referred to in the statute.

MUNICIPAL CORPORATIONS.—THE AUTHORITY OF THE LEGISLATURE OF THE STATE TO DIRECT A MUNICIPALITY TO MAKE ANY PAYMENT out of its funds rests upon the proposition that such funds are public moneys acquired under the authority of the state for public purposes.

CONSTITUTIONAL LAW.—THE INHIBITION IN THE CONSTITUTION AGAINST THE ENACTMENT OF ANY LAW MAKING A GIFT, or authorizing the making of a gift, of any public money or thing of value to any individual, municipal or other corporation whatever, should not receive a strict and narrow construction, but its spirit, as well as its language, should be followed, and in determining whether a statute violates the prohibition, the provisions of the statute, as well as those matters of which the court can take judicial knowledge, must be considered.

CONSTITUTIONAL LAW.—THE GIFTS WHICH ARE FORBIDDEN by the constitution of California include all appropriations of public money for which there is no authority or enforceable claim, or which rest in some moral or equitable obligation, which in the mind of a generous, or even a just, individual, dealing with his own moneys, might prompt him to recognize as worthy of some reward. Public moneys must be regarded as held for public purposes, and the legislature is forbidden to dispose of them except for such purposes.

CONSTITUTIONAL LAW.—FORBIDDEN GIFT.—An appropriation of money by the legislature for the relief of one who has no legal claim therefor
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must be regarded as a gift within the meaning of that term as used in the constitution of California; and it is none the less a gift that a sufficient motive appears for the appropriation, if the motive does not rest upon a valid consideration.

CONSTITUTIONAL LAW—GIFTS—ACT FOR THE RELIEF OF A STREET CONTRACTOR.—If a street contractor has done work for which he is unable to obtain compensation because of errors and irregularities of the municipal officers, and under a statute which requires every contract for street work to contain a condition, that in no event will the municipality be liable therefor, an act which directs such municipality to pay him a specified sum for such work is a gift, and is invalid under a constitution forbidding the legislature to make gifts of public money.

John H. Durst and Dorn and Dorn, for the appellants.

Mich. Mullaney, for the respondent.

¹⁹ **HARRISON, J.** The legislature of this state at its session in 1891 passed the following act (Stats. 1891, p. 513):

"The board of supervisors of the city and county of San Francisco are hereby authorized and directed to order paid to John J. Conlin, or his assigns or legal representatives, the sum of fifty-four thousand and fifteen dollars and thirty-seven cents, said amount being the principal, together with all ²⁰ the interest thereon, that remains due and unpaid to the said John J. Conlin, on contracts entered into with the said John J. Conlin by the superintendent of streets of the said city and county, for work done upon the public streets of said city and county, and for material furnished for the improvement of the said public streets; for which work done and material furnished he has not been able to obtain compensation, according to the mode and procedure in such cases made and provided by statute, by reason of errors, omissions, and irregularities of the municipal officers of the said city and county, in their official proceedings concerning such work and material furnished."

Thereafter the plaintiff presented his demand for the said amount to the board of supervisors, and on the 7th of December, 1891, the board refused to allow or order the same paid, whereupon the plaintiff brought this proceeding in the superior court to obtain a mandate directing the defendants to allow the claim. The defendants filed an answer to the said complaint, in which they set forth certain matters alleged to be the basis of the action of the legislature in passing the act, and pleaded that by virtue thereof the act was in contravention of certain provisions of the constitution. The plaintiff demurred to this answer, but the court overruled his

demurrer, and made findings of fact upon the issues presented by the answer, but in its conclusions of law held that the validity of the act must be determined from its face, and could not be made to depend upon matters of fact not appearing thereon.

In *Stevenson v. Colgan*, 91 Cal. 652, 25 Am. St. Rep. 230, we said that "in passing upon the constitutionality of a statute, the court must confine itself to a consideration of those matters which appear upon the face of the law, and those facts of which it can take judicial notice"; and the same principle was repeated in *Bourn v. Hart*, 93 Cal. 321, 27 Am. St. Rep. 203. The court in the present instance followed this rule in its conclusions of law, but its previous action in hearing evidence and making findings of fact, wherein it attempted to ascertain the "errors, omissions, and irregularities of municipal officers," which in its findings it assumed to be "referred to in the act of the legislature of 1891," was inconsistent therewith. It should have sustained the demurrer to the answer, and determined ²¹ the plaintiff's right of action without considering the facts therein alleged.

The authority of the legislature of a state to direct a municipality to make any payment of its funds rests upon the proposition that these moneys are public moneys acquired under the authority of the state for public purposes; that, as the municipality is created only as an auxiliary to the legislature for governmental purposes, with a jurisdiction confined to a limited portion of the state, it does not cease to be under the control of the legislature; and that the legislature has the same power of disposition over the public moneys in the custody of the municipality that it has over those in the state treasury. In making application of this principle, the legislature of this state prior to 1879 passed many acts of relief, in which public moneys were appropriated to individuals whose claims rested entirely upon some moral obligation which could not in every instance be formulated in convincing or satisfactory terms, and when the constitutional convention met in that year, it placed a restriction upon such appropriations by the provision of section 31 of article 4 of the constitution, which declares that the legislature shall not have power "to make any gift, or authorize the making of any gift, of any public money, or thing of value, to any individual, municipal, or other corporation whatever." This prohibition is, however, primarily addressed to the legislature,

and when an act of that body is brought before the judiciary for review, it is not to be assumed that the legislature has intentionally disregarded it, although if the act is in manifest violation of the foregoing section, it must be declared by the courts to be invalid. The provision, moreover, is not to receive a strict and narrow interpretation, but its spirit as well as its language is to be followed: *People v. Hopkins*, 55 N. Y. 81; and in determining whether a statute is in violation thereof, all the provisions of the statute, as well as those matters of which the court can take judicial knowledge, must be considered.

The "gift" which the legislature is prohibited from making is not limited to a mere voluntary transfer of personal property without consideration, which the Civil Code, section 1146, gives as the definition of a gift; but the term, as used in the constitution, includes all appropriations of public money for which there ²² is no authority or enforceable claim, or which rest upon some moral or equitable obligation, which in the mind of a generous or even a just individual, dealing with his own moneys, might prompt him to recognize as worthy of some reward. The legislature is to be regarded as holding the public moneys in trust for public purposes, and this limitation of the constitution is directed against its disposal of these funds except in accordance with such purposes. All those moral considerations or demands resting merely upon some equitable consideration or idea of justice, which in an individual acting in his own right would be upheld, are insufficient as a basis for making an appropriation of public moneys. An appropriation of money by the legislature for the relief of one who has no legal claim therefor must be regarded as a gift within the meaning of that term, as used in this section, and it is none the less a gift that a sufficient motive appears for its appropriation, if the motive does not rest upon a valuable consideration. In *Stevenson v. Colgan*, 91 Cal. 652, 25 Am. St. Rep. 230, we said: "By these provisions of the constitution there is denied to the legislature the right to make direct appropriations to individuals from general considerations of charity or gratitude, or because of some supposed moral obligation resting upon the people of the state, and such as a just and generous man, although under no legal liability so to do, might be willing to recognize in his dealings with others"; and we also said in *Bourn v. Hart*, 93 Cal. 321, 27 Am. St. Rep. 203: "A legislative appro-

priation made to an individual in payment of a claim for damages on account of personal injuries sustained by him while in its service, and for which the state is not responsible, either upon general principles of law, or by reason of some previous statute creating such liability, is a gift within the meaning of the constitution."

The act under consideration purports to be for the "relief" of the plaintiff, and declares that the appropriation is made for the amount that remains due and unpaid upon certain contracts for which "he has not been able to obtain compensation according to the mode and procedure in such cases made and provided by statute," thus by its own terms showing that there was no legal obligations in favor of the plaintiff. The act also assigns the "errors, omissions, and irregularities of municipal officers" ²³ of said city and county in their official proceedings concerning such work and material furnished" as the reason why the plaintiff has not been able to obtain compensation for the work done by him, thus clearly pointing out the cause as well as the fact of there being no obligation in his favor.

As we take judicial notice of the statutes under which any improvements of streets in the city and county of San Francisco have been made, we know that each of the contracts under which the plaintiff did any work or furnished any material for the improvement of those streets contained an express condition that in no case would the city and county of San Francisco be liable for any portion of the expense of the said work or improvement, or for any delinquency of persons or property assessed. It thus appears that by the terms of the contracts referred to in the act as the basis of the plaintiff's right to any compensation, he had expressly agreed to the exemption of the city and county of San Francisco from any liability thereunder, so that the effect of the statute would be to give him the amount of money therein specified to which, by his own agreement, he had waived all legal claim. This can be regarded in no other light than as a simple gift. We are aware that in *Creighton v. San Francisco*, 42 Cal. 446, it was held that a similar provision in a contract did not prevent the legislature from directing the municipality to make payment to the contractor; but at that time there was no constitutional prohibition against any disposition whatsoever that the legislature might make of public moneys after they had been brought into the public treasury. It was for the

very purpose of preventing such disposition that the provisions of the present constitution were inserted, and, consequently, the case of Creighton is of no authority in construing the present statute.

If the failure of the plaintiff to obtain compensation for the work done by him was by reason of any errors, omissions, and irregularities of the municipal officers which prevented them from having any jurisdiction to order the work done, or which rendered his contract invalid, these were matters which were open to the plaintiff, and could have been ascertained by him before entering into the contract; if however, they arose subsequent to his entering into a valid contract, the statutes, by virtue of ²⁴ which the contract was made, gave him the right to have such errors, omissions, and irregularities corrected upon an appeal to the board of supervisors, and if he failed to seek redress in this mode his loss of compensation arose from his own neglect. In either case the act of the legislature is an attempt to appropriate public moneys for purposes for which there was no legal claim or obligation. The moral claim which, it is alleged, arose from the fact that the city had enjoyed the advantage of the work, is, as we have seen, insufficient to support the act. In *McBean v. San Bernardino*, 96 Cal. 183, a sewer had been constructed under a contract with the city of San Bernardino, which contained a clause exempting it from liability, similar to that in the contracts entered into by the plaintiff herein, and, after the completion and acceptance of the sewer, the city passed a resolution authorizing the payment of a portion of the cost of its construction out of the funds of the municipality. In an action to recover this amount it was held that, inasmuch as by reason of this exemption there had never been any liability for the work on the part of the city, the resolution to pay the amount was without any consideration to support it, and that although the city had received the actual benefit of the work, this did not create even a moral obligation to pay for its cost. One of the reasons assigned for this conclusion was that cities are creatures of law, with powers defined by law, and that persons dealing with them are chargeable with notice, not only of the extent of their power, but also of the mode in which their power may be exercised. The principles declared in that case are controlling in this. The constitution makes the same inhibition on an appropriation of public moneys by the legislature without any consideration that exists against a

similar appropriation by a municipality. The legislature has no more right to direct a municipality to give away the public moneys in its treasury than had the municipality without such direction.

We hold, therefore, that the act in question violates the provisions of the foregoing section of the constitution, and is therefore invalid; and for this reason the judgment is reversed.

McFARLAND, J., GAROUTTE, J., PATERSON, J., DE HAVEN, J., and BEATTY, C. J., concurred.

Rehearing denied.

STATUTES—CONSTITUTIONALITY OF, HOW DETERMINED.—The testimony of experts and other witnesses is not admissible to show that in carrying out a law, some provision of the constitution may possibly be violated. If it cannot be made to appear that the statute is in conflict with the constitution by argument deduced from the language of the act itself, or from matters of which the court can take judicial notice, the act must stand: *People v. Durston*, 119 N. Y. 569; 16 Am. St. Rep. 859. A court, when called upon to decide upon the validity of a statute, will presume it to be constitutional until the contrary clearly appears: *Burlington etc. Ry. Co. v. Dey*, 82 Iowa, 312; 31 Am. St. Rep. 477, and note; *Santo v. State*, 2 Iowa, 165; 63 Am. Dec. 487, and note with the cases collected.

LEGISLATURE—WHAT GIFTS ARE PROHIBITED.—The constitution of California declares that the legislature shall have no power to make any gift of any public money to any individual, or to grant any extra allowance to any public officer or servant of the state, after the service has been performed in whole or in part, or the contract has been entered into, and performed in whole or in part: *Bourn v. Hart*, 93 Cal. 321; 27 Am. St. Rep. 203; *Robinson v. Dunn*, 77 Cal. 473; 11 Am. St. Rep. 297, and note.

NAFTZGER v. GREGG.

[99 CALIFORNIA, 83.]

VENDOR AND VENDEE—TENDER OF DEED.—A vendor of lands is under no obligation to execute a deed until the purchase price is tendered or paid and cannot be put in default without a tender of such price. On the other hand, the vendee from whom the purchase money is due cannot be put in default or subjected to any action therefor unless a deed is first tendered to him. Therefore in an action upon promissory notes, it is a complete defense that they were given for the purchase price of land, and the plaintiff has not tendered or made any conveyance thereof.

RES JUDICATA—RIGHT OF APPEAL.—While the party against whom a judgment has been entered retains the right to appeal therefrom, it cannot be admitted in evidence against him as a bar, under a statute declaring that an action shall be deemed pending from the time of commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

E. B. Stanton, and Chapman and Hendrick, for the appellant.
Goodcell and McIntyre, for the respondents.

⁸³ The COURT. The above-entitled causes between the same parties and relating to the same subject matter will be considered together for convenience, if not of necessity. As No. 14705 was first tried, it will be first stated. It is an action upon two ⁸⁴ promissory notes made by the defendants, each for two thousand five hundred dollars, dated September 8, 1887, one payable one year, and the other two years after date. It was commenced March 10, 1890. The complaint is in two counts in the usual form, and is on its face sufficient. The answer of the defendants expressly admits each and every allegation of the complaint, but alleges that there was no consideration for said notes, or either of them, other than a written contract of even date with the notes, whereby the plaintiff agreed to sell and convey to the defendants, and the defendants agreed to buy from plaintiff, a certain lot or parcel of land, and to pay therefor seven thousand dollars—two thousand dollars upon the execution of the contract, two thousand five hundred dollars in one year, and two thousand five hundred dollars in two years from date of contract; the deferred payments being evidenced by the two notes described in the complaint. A copy of the contract is exhibited as a part of the answer, and contains the following: "In the event of a failure to comply with the terms hereof by the said parties of the second part (defendants), the said party of the first part shall be released from all obligations in law or in equity to convey said property, and said parties of the second part shall forfeit all right thereto; and the said party of the first part, on receiving such payments at the time and in the manner above mentioned, agrees to execute and deliver to the parties of the second part, or to their assigns, a good and sufficient deed conveying said land free and clear of all encumbrances made, done, or suffered by the said party of the first part; . . . and that time is of the essence of this contract." The answer further alleges that the defendants paid two thousand dollars at the time the contract was executed, and that "the plaintiff has not executed to the defendants the deed provided for in said contract, or any deed of conveyance of said land, or any part thereof." The court found as facts the execution of the contract; that defendants paid thereon at the time it was executed two thousand dollars;

that the notes in suit were given at the same time as a part of the same transaction; and that "the plaintiff has not executed to the defendants the deed provided for in said contract, or any deed of conveyance of said land, or any part thereof"; and as conclusions ^{ss} of law found "that the plaintiff is not entitled to any relief in this action," and "that the defendants are entitled to judgment against the plaintiff for their costs"; and rendered judgment accordingly on July 29, 1890. The plaintiff appealed from this judgment on July 9, 1891, upon the judgment-roll, without a bill of exceptions.

Number 14704 is an action (commenced October 11, 1890) upon the same two promissory notes to recover the amount alleged to be due thereon, and to enforce the vendor's lien upon the lot described in the contract of sale. The complaint differs from that in the former action (No. 14705) only in that it sets out the contract of sale, alleges that the notes were made to secure the unpaid purchase money, and "that, after the maturity of said promissory notes, and before the commencement of this action, the plaintiff tendered to said defendants a good and sufficient deed conveying to the defendants the said premises described in the said agreement, free and clear of all encumbrances made, done, or suffered by the plaintiff, . . . and at the same time demanded of said defendants payment of the said promissory notes; but that said defendants then refused, and ever since have refused, to accept the said deed, and then refused, and ever since have refused, to pay the said promissory notes, or any part thereof; and "that at the time of the maturity of said promissory notes the plaintiff was, and ever since has been, and still is, ready, willing, and able to carry out and perform his said agreement on his part, and to deliver to said defendants a good and sufficient deed conveying said premises to said defendants free and clear of all encumbrances made, done, or suffered by the plaintiff; and he hereby offers to deliver such deed upon payment of said notes." In their answer to this complaint the defendants "admit each and every averment thereof, except that as to the averment that the plaintiff was and is the owner of the land described in said amended complaint; these defendants are not sufficiently informed to enable them to answer the same, and therefore they deny that the plaintiff was at any of the times mentioned in the complaint, or that he now is, the owner of said land, or able to convey a good title thereto to defendants." For a further answer they

pleaded the former judgment in the above-entitled cause, No. 14705, as a bar to this action. The plaintiff demurred to each branch of the answer on the ground that it stated no defense. The demurrer was overruled, and the cause was tried by the court. The court found as facts that the former action was between the same parties and for the same cause, and that it was therein adjudged and determined that the averments of the answer therein were true; that the plaintiff had failed to perform said contract of sale on his part, and that he was not entitled to any relief against the defendants on account of said notes, or the purchase price of said land; and as a conclusion of law found that by the judgment in the former action the plaintiff is estopped from maintaining this action, and accordingly rendered final judgment in favor of defendants on July 7, 1891. From this judgment plaintiff appealed on July 9, 1891, upon the judgment-roll containing a bill of exceptions.

1. On the appeal from the former judgment (No. 14705) the appellant contends, in substance, that no defense to the action was either pleaded by defendants or found by the court, and that plaintiff was entitled to judgment upon the pleadings and findings of fact. It is true that the averment in the answer that the plaintiff had not executed to defendants the deed provided for in the contract, and the finding of the court that this averment was true, were entirely immaterial, since the plaintiff was under no obligation to execute the deed until the purchase money was tendered or paid, and could not be put in default without a tender of the purchase money by the defendants: *Englander v. Rogers*, 41 Cal. 420; *Newton v. Hull*, 90 Cal. 487. But the setting out of the contract, and the averment that the execution of the contract and the making of the notes were parts of the same transaction, and that the contract was the only consideration for the notes, were material, since it thereby appeared that "the covenants of the vendor and vendee were mutual and dependent, and neither could put the other in default, except by tendering a performance in his own part, unless the other party either waived the tender, or by his conduct rendered it unnecessary": *Englander v. Rogers*, 41 Cal. 420. And also that the complaint was defective in that it did not set out the contract of sale, nor aver that plaintiff had tendered to defendants a deed of the land. The averment of ⁸⁷ this new matter in the answer was a complete defense to the *prima*

facie cause of action stated in the complaint, and the finding by the court that this new matter was true, supports the judgment. It may be that the plaintiff might have obtained leave to amend his complaint by adding the averment that he had tendered a deed before the commencement of the action, if the fact had been so; but, for some reason which does not appear, he did not so amend his complaint. There was no averment in the pleading of either party, and consequently no finding, as to whether or not the plaintiff had tendered a deed; yet facts were pleaded by defendants, and found by the court, from which it resulted as a legal conclusion that the plaintiff had no cause of action. The plaintiff had failed to set forth that part of the contract which required him to tender a deed as a necessary condition of his right to recover on his notes, and also failed to state that he had performed that condition; and the new matter stated in the answer only partially supplied the deficiency, as it contained nothing in respect to a tender of the deed. It devolved upon the plaintiff to allege and prove that he had tendered a deed; otherwise it did not appear that the defendants were in default. The authorities, in addition to those above cited, which warrant this conclusion are numerous, and a large collection of them may be found in 2 Bingham on Real Estate, page 716, chapter 12, etc.

2. On the appeal from the subsequent judgment (No. 14704) the appellant contends, first, that his demurrer should have been sustained to that part of the answer which denies that plaintiff was the owner of the land he agreed to sell to defendants, or able to convey a good title thereto, and puts the denial on the ground that "these defendants are not sufficiently informed to enable them to answer the same." Section 437 of the Code of Civil Procedure provides: "If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground." It seems obvious that the denial in this case is not in substantial compliance with the code, since it does not state that defendants have no belief on the subject sufficient to enable them to answer; but the point is of no importance, for the reason that the court ^{ss} made no finding upon the issue attempted to be made by this denial, and placed its decision solely upon the ground that the former judgment is a bar to this action.

But it is claimed that the court below erred in admitting in evidence against plaintiff's objection the judgment in the former action, because it had not become final with reference to the subject matter thereof, as the time for appeal therein had not expired when the trial of this cause was had. We think this claim should be sustained.

Section 1049 of the Code of Civil Procedure provides that an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

It appears that the judgment in the former action was given and entered July 29, 1890, and that said action was still pending within the meaning of the provisions of the foregoing section when this cause was tried in the court below, which the record shows was commenced on March 12, 1891, more than four months before the time for appeal had passed.

It therefore follows that the court erred in admitting in evidence the judgment-roll in the former action against plaintiff's objection in bar of plaintiff's right to recover in this action: *Harris v. Barnhart*, 97 Cal. 546.

Let the former judgment, No. 14705, be affirmed; and the latter judgment, No. 14704, be reversed, and the cause remanded for a new trial.

HARRISON, J., concurring. I concur in the judgment. In my opinion, however, the error of the court below was not in admitting the judgment-roll in evidence, but in determining that it constituted a bar to the plaintiff's right of recovery. The evidence offered—the judgment-roll—was relevant to the issue presented by the answer, and of a character competent to establish that issue. The objection that it was not sufficient in itself for that purpose went to its weight, and not to its admissibility. It was a judgment that had been rendered between the same parties upon the same cause of action, and by a court of competent jurisdiction, and unless it is to be held that a judgment is not under any circumstances admissible in evidence ⁸⁹ until the time for an appeal therefrom has expired, the court properly received it. Section 1049 of the Code of Civil Procedure does not purport to prescribe a rule of evidence, but merely to determine the condition of an action after judgment has been rendered, and, inferentially, the effect of the judgment; and there are many cases in which

a judgment is admissible in evidence at any time after its entry. The court could not anticipate that this was all the evidence to be given upon that issue, and thus exclude it from being considered. It might be shown that there had already been a final determination upon appeal, or that the parties had consented that there should be no appeal. When, however, upon the submission of the case it appeared to the court that a year had not elapsed since the entry of the judgment, and no other evidence upon that issue had been introduced, the court should have held that it did not constitute a bar, for the reason that under the provisions of section 1049 of the Code of Civil Procedure the action was deemed to be still pending.

PATERSON, J. I concur in the views of Mr. Justice HARRISON.

GAROUTTE, J. I concur.

BEATTY, C. J. I dissent. I think the judgment in No. 14705 is erroneous, and should be reversed. In the other case, No. 14704, I concur in the judgment of reversal.

VENDOR AND PURCHASER—TENDER OF DEED.—The vendor must prepare and tender the conveyance where he covenants to give title to a purchaser upon the payment of the purchase price: *Walling v. Kinnard*, 10 Tex. 508; 60 Am. Dec. 216. A vendor must tender a conveyance and demand the purchase money of the vendee before he can maintain an action for the purchase price: *Smith v. Henry*, 2 Eng. 207; 44 Am. Dec. 540, and note; *Parker v. Parmale*, 20 Johns. 130; 11 Am. Dec. 253, and note. The failure of the vendor to tender a conveyance when the purchase price became due does not show that there has been a mutual abandonment of the contract: *Bradford v. Parkhurst*, 96 Cal. 102; 31 Am. St. Rep. 189, and note. A vendee of land is not entitled to a deed until the purchase money has been paid in full: *Boston v. Montgomery*, 90 Cal. 307; 25 Am. St. Rep. 123, and note. To sustain an action by the purchaser on a contract to convey, it is necessary to demand a deed of the vendor, and after waiting a reasonable time to call on him and offer to receive it: *Fuller v. Williams*, 7 Cow. 53; 17 Am. Dec. 498; *Blood v. Goodrich*, 9 Wend. 68; 24 Am. Dec. 121, and note. See also *Gregory v. Christian*, 42 Minn. 304; 18 Am. St. Rep. 507, and note.

RES JUDICATA—EFFECT OF APPEAL AND OF RIGHT TO APPEAL.—The principal case presents and determines a question which, so far as we are aware, has not been presented elsewhere for decision, and we must confess that the conclusion reached by the court comes as near surprising us as it is possible for a veteran rambler over paths judicially established, and thereby declared correct, to be surprised at anything which he may there discover. The doctrine of the principal case is, that while the right of appeal exists, though no proceeding looking to an appeal has been taken or is contemplated, the judgment is without effect as *res judicata*. This rule was suggested in *Harrie v. Barnhart*, 97 Cal. 546; but its adoption or rejection was not there

necessary. The principal case was referred to in *In re Blythe*, 99 Cal. 472, but in that case an appeal had been taken and was still undetermined, and the question before the court was not as to the effect of the right of appeal, but as to the effect of an appeal actually taken and still pending. Neither in the principal case nor in any other in which the question was alluded to was it much considered, nor did the court give any other reason for its conclusion than that the rule of *res judicata* applied only to final judgments, and that by section 1049 of the Code of Civil Procedure of California an action is deemed to be pending until its final determination on appeal, or until the time for appeal has passed, and therefore, until the arrival of such time, the judgment is not final so as to sustain an application of the principles of *res judicata*. It is true, as stated in the case last cited, that it is not until final judgment is rendered and directed to be entered, that the questions at issue are finally settled between the parties, so that anything which has been decided is no longer subject to further contention or decision. The case cited by the court in *In re Blythe*, 99 Cal. 472, to wit, *Webb v. Buckelew*, 82 N. Y. 560, and all the other cases, except those in California, containing general expressions of this nature, were instances in which decisions had been made in the prosecution of the cause in the trial court prior to the entry of any judgment, and which were also of such a character that the court might reconsider or set them aside, and no judgment final even in form had been entered. The citation by the supreme court of California of the decision in 82 New York is extremely infelicitous and misleading. In the case determined by the New York court of appeals no judgment final in form had been entered, and it is well known that the courts of that state have uniformly, and sometimes in very extreme cases, held that not even the pendency of an appeal and its prosecution with due diligence deprived a party, in whose favor a judgment had been entered, of its benefit as an estoppel: *Parkhurst v. Berdell*, 110 N. Y. 386; 6 Am. St. Rep. 384.

In stating that an action is deemed to be pending from its commencement until its determination upon appeal, or until the time for appeal has passed, the legislature but recognized a fact which existed independently of the statute, from the enactment of laws authorizing the prosecution of appeals and providing the time after which such prosecution could not be commenced; but there is nothing indicating that the legislature intended to assert that a judgment, while this right existed, was not final for any purpose, or indeed for all purposes, except that its entry did not cut off the right to appeal within the time prescribed by statute. If it be true, as the court assumes in the principal case, that a judgment is not final while a right of appeal remains, it is equally true that by statute an appeal be taken only from a final judgment; and if a judgment is not final while the right of appeal exists, no appeal can be taken until this right terminates, after which it cannot be taken at all, because the statutory limitation of time has intervened. It is beyond controversy in California that an appeal cannot be taken from a judgment until it is final: Code Civ. Proc., sec. 963; but it is no longer true in California or elsewhere that the doctrine of *res judicata* is confined to final judgments, for there are many instances in which the decisions of motions involving substantial rights are *res judicata*, and bind the parties until they are vacated by some appropriate proceeding, or permission is given by the court to reopen and reconsider the questions determined: *Freeman on Judgments*, secs. 325, 326. By the practice in California a judgment may be entered in which the findings of fact, actual or presumed, are all in favor of the prevailing party, and these findings not being attacked by motion for a

new trial or otherwise, an appeal from the judgment must necessarily result in its affirmance, because the findings of fact are no longer proper subjects of consideration in any court. It is possible, however, for a technical right of appeal to exist for a year after the findings have been settled and after there is an absolute impossibility of attacking them in any way, and yet if the decision in the principal case be correct, the existence of this technical right, though it can by no means lead to a reversal or other vacation of the judgment, deprives it of its effect as *res judicata*, and leaves the prevailing litigant for a whole year without one of the most substantial fruits of his judgment.

Nowhere, except in California, has the contention ever been made that the mere existence of a right of appeal destroyed the effect of a judgment as *res judicata*. The effect of an appeal duly taken and diligently prosecuted has been considered in many of the states, but upon few other questions have the courts been so unable to reach harmonious conclusions. The question cannot be decided without working extreme hardship in some instances. If a judgment, final in form, had been entered, and which is final at least to the extent that it cannot be set aside by the court which pronounced it, it would seem that the prevailing litigant should be entitled to the fruits of his judgment, even though an appeal has been taken, unless the statute expressly provides that the enforcement of the judgment may be suspended by an undertaking or other security, and such security had been given. The interests of the appellant are sufficiently protected by his right, on a reversal, to recover all things of value acquired under or by virtue of the judgment against him. Hence the decisions affirming that until a judgment is actually reversed its effects as *res judicata* continues: *Willard v. Ostrander*, 51 Kan. 481; *post*, p. 294; *Null v. Comparet*, 16 Ind. 107; 79 Am. Dec. 411; *Bank of North America v. Wheeler*, 28 Conn. 433; 73 Am. Dec. 683; *Faber v. Hovey*, 117 Mass. 108; 19 Am. Rep. 398; *Scheible v. Slagle*, 89 Ind. 328; *Parkhurst v. Berdell*, 110 N. Y. 386; 6 Am. St. Rep. 384; *Planters' Bank v. Calvit*, 3 Smedes & M. 143; 41 Am. Dec. 616; *Peters v. Banta*, 120 Ind. 416; *Allen v. The Mayor*, 9 Ga. 286; *Rogers v. Hatch*, 8 Nev. 35; *Thompson v. Griffin*, 69 Tex. 139; *Moore v. Williams*, 132 Ill. 589; 22 Am. St. Rep. 563; *Day v. Holland*, 15 Or. 464. On the other hand, if an appeal does not suspend the effect of a judgment as *res judicata*, it may happen that even during the successful prosecution of an appeal the party in favor of whom the judgment has been entered will be enabled to obtain the benefit of it by offering it in support of a plea of *res judicata* in some other action or proceeding, and that he cannot afterwards be deprived of the benefit thus obtained, though he subsequently procures a reversal of the judgment, because this reversal can rarely be made to appear by the record in the action in which the judgment has been so used against him (*Parkhurst v. Berdell*, 110 N. Y. 386; 6 Am. St. Rep. 384), though in some cases the courts seem to have taken judicial notice of the reversal, and thus enabled the appellant to obtain the benefit of it in both actions: *Zanesville G. Co. v. Zanesville*, 47 Ohio St. 85. The mere issuing and enforcement of an execution may be stayed upon appeal by an appropriate bond, but there is no provision in any of the statutes whereby the force of the judgment as evidence or as an estoppel may be avoided by the giving of any bond or other security. Therefore, in many of the states the courts, in the absence of any statute to that effect, have determined that an appeal suspends the effect of the judgment as an estoppel, and renders it no longer admissible in evidence between the same parties: *Sharon v. Hill*, 26 Fed. Rep. 337; *Green v. United States*, 18 Ct. of Cl. 93; *De Camp v. Miller*, 44 N. J. L. 617; *Atkins v. Wyman*, 45 Me. 399; *Day v. De Jonge*,

66 Mich. 550; *Souter v. Baymore*, 7 Pa. St. 415; 47 Am. Dec. 518; *State v. McIntire*, 1 Jones, 1; 59 Am. Dec. 566; *Haynes v. Ordway*, 52 N. H. 284; *Byrne v. Prather*, 14 La. Ann. 663; *Glenn v. Brush*, 3 Col. 26; *Small v. Haskins*, 26 Vt. 209; *Nastinger v. Gregg*, 99 Cal. 83; *ante*, p. 23; *In re Blythe*, 99 Cal. 472. "In Connecticut the operation of an appeal depends upon the character of the jurisdiction of the appellate court. If the latter court has authority to try the case *de novo* and to settle the controversy by a judgment of its own, and to enforce such judgment by its own process, then it is plain that by the appeal the judgment of the inferior court is not merely suspended; it is vacated and set aside, and can no longer have an effect as an estoppel. But if the appeal is in the nature of a writ of error, conferring power on the appellate court to determine such errors as may have occurred at the trial or in the decision of the cause, and giving the court, upon such determination, no other authority than that of reversing, modifying, or affirming the judgment of the inferior court, and of remitting the case back to the tribunal whence it came, that such tribunal may conform its judgments and proceedings to the views of the superior, then the judgment appealed from does not, until vacated or reversed, cease to operate as a merger and a bar: *Bank of North America v. Wheeler*, 28 Conn. 433; 73 Am. Dec. 683; *Curtiss v. Beardsley*, 15 Conn. 518; *Cain v. Williams*, 16 Nev. 426. The effect of a judgment is not limited by the fact that on appeal it was affirmed on an equal division of the judges: *Lyon v. Ingham Circuit*, 37 Mich. 377; *Durant v. Essex Co.*, 7 Wall. 107. The mere pendency of a motion for a new trial neither destroys nor suspends the effect of a judgment: *Young v. Brehl*, 19 Nev. 379; 3 Am. St. Rep. 892; but the granting of such motion vacates the judgment and the verdict or findings upon which it rested, and neither can any longer be respected as *res judicata*: *Edwards v. Edwards*, 22 Ill. 121; *Sheldon v. Van Fleck*, 106 Ill. 45; *Gulf etc. R. R. v. James*, 73 Tex. 12; 15 Am. St. Rep. 743; *Winona v. Minnesota etc. Co.*, 27 Minn. 415"; *Freeman on Judgments*, sec. 328.

BORLAND v. NEVADA BANK.

[99 CALIFORNIA, 89.]

CORPORATIONS—TRANSFER OF STOCK, WHEN DEEMED TO BE AS COLLATERAL.—If a debtor turns stock over to his creditor without anything being said by either party in reference to buying or selling, or as to its value, such transfer will be considered to be as collateral security, and the transferee cannot be held liable for the debts of such corporation.

SALES, WHAT ARE NOT.—A transfer of property cannot be regarded as a sale thereof when no purchase price has been agreed upon, nor has the price been in any way made definite, nor has any agreement been entered into from which the price can be ascertained.

PRINCIPAL AND AGENT—EVIDENCE—DECLARATION OF AGENT.—An agent, after a transaction has been completed, cannot bind his principal by any admission or declaration he may make concerning its character.

PAYMENT, WHAT IS NOT.—The transfer of property by a debtor to his creditor cannot be regarded as in payment of the debt, or any portion of it, when there is no express agreement that it shall be accepted in payment, or fixing its value, nor can the intention on the part of the

debtor that the property shall be accepted in payment of his debt operate to discharge it, if his purpose was neither assented to, nor known by, the creditor.

COLLATERAL SECURITY.—If a debtor deposits property with his creditor, the presumption, in the absence of any evidence to the contrary is, that such deposit was made and received as collateral security for the debt, and unless evidence is offered to rebut this presumption, the law makes a positive inference that the assignment is only as collateral security.

Lloyd and Wood, R. S. Mesick, William F. Herrin, and H. L. Gear, for the appellant.

George W. Toule, Jr., and Warren Olney, for the respondent.

⁹¹ **HARRISON, J.** The plaintiff seeks to recover from the defendant as a stockholder in the Wyoming and Dakota Water company, its proportionate liability of certain indebtedness of that corporation to the plaintiff. The case was tried in the court below without a jury, and judgment rendered in favor of the plaintiff, from which and an order denying a new trial the defendant has appealed.

In 1877, August Hemme, being heavily indebted, contemplated going into bankruptcy, and, as the defendant was one of his creditors to the amount of several hundred thousand dollars, Mr. Flood, who was its vice-president, proposed to him that if he would turn over to the bank what property and securities he held it would carry him through. Hemme's indebtedness to the bank was evidenced by several promissory notes upon which he had given collateral security, and, in response to this proposition of Mr. Flood, he turned over to the bank various properties, upon which the bank thereafter from time to time realized by sales, and applied the amounts to his credit. In March, 1880, Flood, having learned that Hemme had certain shares of stock in the above-named corporation which he had not turned over to the bank, sent for him, and upon his demand that this stock should be given up to the bank, Hemme caused the same to be transferred on the books of the corporation from the name of his wife into that of George B. Bailey, trustee, and delivered the certificate therefor to Flood. Bailey was an employee in the bank, in whose name all securities held by the bank, whether as proprietor or collateral, were placed, and held by him as trustee for the bank. It does not appear that any entry of the transaction was made upon the books of the bank, and the certificates for the stock were themselves placed by

one of the employees of the bank in an envelope, and marked as held as security against Hemme's account. At this time the bank still held some of the other property which had been turned over to it in 1877 undisposed of, and disposals thereof were thereafter made from time to time, and the proceeds ²³ placed to the credit of Hemme's account. This stock, however, was never disposed of by the bank, but diminished in value so that it was regarded of no value whatever, and the notes themselves became outlawed, and in 1882 were surrendered to Hemme, at which time he made a written assignment of the stock to the bank.

It is contended by the plaintiff that the transaction between Hemme and Flood was an absolute transfer of the stock, by which the entire title thereto was vested in the bank, while the defendant contends that the stock was received and held by it only as a collateral security for the indebtedness of Hemme; and upon the determination of this disputed point hinges the liability of the defendant, for if it took the stock as security merely, it was not a stockholder, liable for the debts of the corporation, while if it became the absolute owner thereof, it is chargeable with its proportionate liability of the corporate debts. Section 322 of the Civil Code declares: "Each stockholder of a corporation is individually and personally liable for such portions of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. . . . The term 'stockholder,' as used in this section, shall apply not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of the stock, although the same appear on the books in the name of another. . . . Stock held as collateral security, or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with any proportion of the debts or liabilities of the corporation; but the pledgor or person or estate represented is to be deemed the stockholder as respects such liability."

The parties to the transaction under consideration did not by any words or instrument attempt to define the relation which they should hold to the property after it had been delivered by Hemme to the bank, and the evidence relating to the transaction itself is exceedingly meager. There was no

express agreement of any kind between them. Their relations at the time were evidently of an unfriendly character, and they were dealing ⁸³ with each other in the attitude of a creditor seeking to get from his debtor that which he had agreed to give him, and a debtor reluctantly parting with what he had agreed to give. Although Hemme, when asked at the trial whether he delivered that stock absolutely to Flood, or whether he retained an interest in it, stated that he delivered the stock absolutely to Mr. Flood as the property of the bank, he did not testify that anything of that nature was said either by Flood or himself at the time it was delivered, or at any time, and his testimony cannot be considered as anything more than either his own opinion of the transaction, or as a purpose which he then had, but which he did not disclose.

The transaction cannot be regarded as a sale of the stock from Hemme to the bank. There was nothing said by either party in reference to buying or selling the same, nor was the value of the stock agreed upon or even discussed; nor was any price fixed at which Hemme would part with it or Flood accept it. Story, in his Treatise on Sales, section 1, defines a sale to be "a transfer of the absolute title to property for a certain agreed price," and in section 217 of the same treatise states that the price required in a contract of sale must be: 1. Money or its negotiable representative; 2. Certain and definite, or capable of being rendered definite; 3. An actual price, seriously intended to be exacted. Section 1721 of the Civil Code defines a sale to be "a contract by which, for a pecuniary consideration called a price, one transfers to another an interest in property." It is not necessary, however, that the price for which property is sold shall be money only, or that it shall be actually delivered at the time of the transaction. The term, as here used, is equivalent to compensation: *Hudson Iron Co. v. Alger*, 54 N. Y. 177. But as values are expressed in money units, a sale implies a reciprocal transfer of this compensation, past, present, or future, whose value in money is agreed upon between the parties. It is, however, the agreement to pay a price, rather than the actual payment of the price, which is the essential element of a sale, but the price itself must be definite, or the agreement must contain such elements that the price can be ascertained therefrom. In addition to the necessity for a price, there must be the assent of the parties that the transaction ⁸⁴ shall be a

sale. This must be an express agreement, or such an implication must follow from the nature of the transaction itself. The mere transfer of possession without the agreement, express or implied, that such transfer is a sale on the one hand and a purchase on the other, will not be a sale or have the effect to transfer the title. The testimony of Grayson that at some time subsequent to the transfer of the stock, Flood spoke of the transaction as a "purchase," cannot be used to determine the nature of the transfer. Flood, as the agent of the defendant, could not bind it by any admissions or declarations respecting the character of the transaction, which he might subsequently make in reference thereto: *Beasley v. San Jose Fruit Packing Co.*, 92 Cal. 388.

Neither can the transaction be regarded as a payment by Hemme upon the amount of the indebtedness against him held by the bank. Payment, like sale, can result only from the mutual agreement of the parties that the transaction shall have that effect, and without such consent the transaction cannot be treated by the court as a payment. Technically, payment can be made only in money. It is defined in the Civil Code to be "performance of an obligation for the delivery of money only": Sec. 1478. Payment may, however, be made in merchandise or any commodity other than money which the parties to the transaction agree shall be accepted as payment, but the consent of the creditor to accept as payment the thing received is as essential as the purpose of the debtor that it shall have that effect. "The acceptance of any valuable thing in discharge of the debt amounts to payment, but it is the distinct agreement of the creditor to accept the thing in discharge of the debt that gives it the character of payment. Without this, the transaction is regarded either as furnishing matter of setoff or as security collateral to the original debt, according as the subject received is in possession or in action": *Covely v. Fox*, 11 Pa. St. 174. But, although the receipt of a commodity by a creditor from his debtor at an agreed valuation, with the agreement that the sale shall be applied in a credit upon the debt, is equivalent to a payment, both of these elements are wanting here. If it was the purpose of Hemme to transfer the stock in part satisfaction or in payment of his obligation to ^{the} the bank, such purpose was ineffectual without the assent of the bank.

Inasmuch as no express agreement between the parties relative to the character of the transaction, and no statement by

them, or either of them, of the character in which it should be treated was shown at the trial, we are compelled to determine their rights according to the principles of law applicable to such a transaction in the absence of any agreement. In other words, we are to ascertain what legal presumption would arise from the transaction in view of the circumstances under which it was had, having reference also to the relation which the parties held to each other. If there had been no previous relations between them, the deposit of the stock would constitute a mere bailment, for there is nothing indicative of a gift, and it is not pretended that such was the intention of either of the parties. The owner of property remains such until he is divested of his ownership by law, or by his voluntary act. The mere transfer of his property to another does not divest him of his ownership, unless such was his intent, and manifested by suitable acts. If the person to whom the transfer is made is his creditor, his ownership will none the less be retained in the absence of any evidence respecting his motives in making the transfer, and even if it was his purpose to divest himself of his title thereto, or to make a transfer in satisfaction or payment of his obligation, either in whole or in part, such purpose would be ineffectual without the consent of the creditor to receive it therefor; yet, as it must be presumed that the parties to such transaction made the transfer for some purpose, and as their act is entitled to receive consideration, the transaction will be regarded as having been made in accordance with their presumed motive. The law will make the inference therefrom that by the transaction they intended to effect that which would be of mutual benefit to each without causing a loss to either, or giving to either an advantage which would not be presumed to have been within their contemplation. Hence, when a debtor deposits property with his creditor, in the absence of any showing as to the purpose with which the deposit is made or received, it is presumed that it was intended as a collateral security for the debt. Unless there is some evidence tending to show an intention on the part of the debtor to ^{so} give, and also on the part of the creditor to receive, the property in satisfaction of the debt, either in whole or in part, the law presumes that it is given only as a collateral security. Especially does this presumption arise if the property given is itself a chose in action or a security of a different nature from the debt, whose value is neither intrinsic nor apparent, and is not agreed upon by the

parties, for the reason, as was said by the supreme court of Pennsylvania in *Leas v. James*, 10 Serg. & R. 315: "Such an assignment is not in its nature a payment. It puts no money in the hands of the creditor, but only gives him the means of collecting money from another." The duty of establishing the contrary is affirmative, and it rests upon the debtor. If he fails to perform this duty the law makes the positive inference that the assignment is only as collateral security: *Jones on Pledges*, sec. 17; *Colebrooke on Collateral Securities*, sec. 29; *Eby v. Hoopes*, 1 Pennypacker, 177; *Bayard v. Shunk*, 1 Watts & S. 94; 37 Am. Dec. 441; *Stone v. Miller*, 16 Pa. St. 450; *Perit v. Pittfield*, 5 Rawle, 166; *Caldwell v. Fifield*, 24 N. J. L. 150; *Sutphen v. Cushman*, 35 Ill. 186; *Harris v. Lombard*, 60 Miss. 29. The debtor cannot make his creditor a forced purchaser of the property or compel him to exchange his obligation for the property transferred, and this is eminently the case where no value is agreed upon, or even spoken of at the time of the transfer. The burden is always upon the debtor to show that a substituted performance of his obligation to pay money was accepted by the creditor as the equivalent of payment, or in satisfaction of the obligation. Taking the promissory note of a third party from the debtor will always be regarded as given for collateral security unless proof is made that it was given and received as payment: *Brown v. Olmsted*, 50 Cal. 162. "The mere acceptance by the creditor of a negotiable note of a third person makes it but collateral security; when such note is given for a pre-existing debt the presumption is, that it was not the intention of the parties that it should operate as an immediate and absolute satisfaction and discharge of the debt, and nothing short of an actual agreement, or some evidence from which a positive inference of discharge can be made will suffice to produce such effect": *Wilhelm v. Schmidt*, 84 Ill. 187.

⁹⁷ There is no evidence in the record herein which tends to rebut this presumption that the stock of the water company was taken and held by the defendant as collateral security for the debt of Hemme. Hemme testified that in March, 1880, when Flood sent for him and demanded the stock, he went out and brought in a certificate for twenty-four thousand shares which stood in the name of his wife, and that at Flood's request he thereupon caused it to be transferred on the books of the corporation to the name of

Bailey, and then delivered the certificate to Flood; that he estimated the stock to be of the value of from two and a half to three dollars per share; that nothing was said, either by Flood or himself, about the value of the stock, or concerning the amount with which he should be credited therefor; nor was anything said as to the amount of the purchase price, or any sum fixed at which he should be allowed credit upon his account; that in June, 1880, Flood, having learned that he had four thousand other shares of stock, again sent for him and demanded this stock also; and that, after having it transferred into the name of Bailey, he brought the certificates to the bank and laid them down on the desk in front of Flood and walked out without saying anything, and that no mention was then made of money or price to be allowed him therefor. This is, in substance, all the evidence of what was said by either Flood or Hemme at the time of the transaction and, in the absence of any statement or agreement by the parties concerning the relations thereafter to be held by them respectively to the stock, it becomes necessary to apply the foregoing principles of law to determine that relation. For this purpose it is also proper to consider the relations which Hemme and the bank held to each other, as well as any circumstances which would give to Flood a reason for demanding the stock, or to Hemme a reason for delivering it. Hemme was still heavily indebted to the bank upon the obligations for which he had given various collateral securities in 1877, many of which were still held by the bank, undisposed of. His indebtedness at that time amounted to several hundred thousand dollars, and Flood had said to him that, if he would give him what securities he had, he would carry him through. Accordingly, Hemme turned over to the bank a line of securities whose value was estimated to be nearly four hundred ~~or~~ thousand dollars, and the bank thereafter proceeded to realize upon them, but they were insufficient to meet the amount of the indebtedness. In view of the fact that Flood's agreement with Hemme was based upon the implied promise of Hemme that he would turn over what he had, we find ample reason for Flood, when he learned that Hemme had this water stock, to demand that it should be turned over to him, and also for Hemme to comply therewith; and, even if there were no other evidence in the case, it would follow that the bank would be regarded as holding the stock in the same capacity as it held the property which was turned over to it

in 1877. There is no evidence in the record tending to show that the transfer in 1877 had any other character or effect than to operate as a collateral security for the indebtedness, and the relation of the parties at the time it was made, as well as the interview between Flood and Hemme prior thereto, and the subsequent dealings of the bank with the property, as well as the statement of some of the plaintiff's witnesses, are confirmatory of the presumption that it was held as collateral security for that debt. The notes of Hemme, by which that indebtedness was evidenced, were retained by the bank after the transfer was made, and it does not appear that any credit was indorsed thereon, or that any amount was placed to the credit of Hemme's account, except as the various securities were realized upon from time to time. In *Sutphen v. Cushman*, 35 Ill. 186, the supreme court of Illinois said: "The appellant was indebted to the appellee at the time the conveyance was made, and there is no evidence whatever of the discharge of that indebtedness. The bond and note by which the greater portion of it was evidenced were retained by the appellee, as well as the Lighthall notes, which had been pledged as security, and the payment of the indebtedness might have been enforced at any time thereafter. Until the contrary is shown the presumption is that the indebtedness was not satisfied by the conveyance; and absolute certainty in regard to the fact takes the place of presumption in case the creditor retains the evidences of the indebtedness, the securities pledged for its payment, and collects the money due upon such securities." In the present case, the indebtedness of Hemme was retained upon the books of the bank as one of its assets, and the retention of ^{the} the notes by the bank, without any indorsement of payment thereon, is persuasive evidence that it was the intention of the parties that the indebtedness should remain for its full amount until it should be reduced by the application of the proceeds resulting from the sale of the securities. In the absence of any evidence tending to show an agreement to reduce the indebtedness by any fixed amount, this is the necessary presumption, for it is not to be supposed that the bank became the owner of the property turned over to it, and at the same time held the indebtedness against Hemme for its full amount; and, in the absence of any agreement regarding the amount for which the property had been accepted by the bank, there would be no means of determining that the indebtedness had been re-

duced in any amount. In any attempt to enforce the indebtedness against Hemme, he could have compelled the bank to first exhaust these securities before calling upon him for any deficiency, whereas, if the bank was the owner of these securities, he would have had no such right, and the bank could enforce its indebtedness for the full amount and still remain entitled to the property turned over to it by him.

We have carefully examined the record, and are satisfied that there was no evidence before the court to sustain its finding that the defendant was the owner of the stock in question; and for that reason its judgment and order denying a new trial are reversed.

McFARLAND, J., GAROUTTE, J., PATERSON, J., and DE HAVEN, J., concurred.

Rehearing denied.

AGENCY—PRINCIPAL WHEN NOT BOUND BY DECLARATIONS OF AGENT.—The declarations of an agent which relate to the past or which are mere recitals of what has been done are not admissible against his principal: *Burnham v. Ellis*, 39 Me. 319; 63 Am. Dec. 625, and note; *Southerland v. Wilmington etc. R. R. Co.*, 106 N. C. 100. Declarations of an agent are not admissible against his principal unless they are made at the time of the transaction to which they relate, and such transaction is within the scope of the agent's employment: *Empire Mill Co. v. Lovell*, 77 Iowa, 100; 14 Am. St. Rep. 272, and note; *Cobb v. Johnson*, 2 Sneed, 73; 62 Am. Dec. 457, and note. Declarations of an agent are not admissible to bind his principal unless they are a part of the *res gestæ*: *Innis v. Steamer Senator*, 1 Cal. 459; 54 Am. Dec. 305, and note; *Moore v. Bettie*, 11 Humph. 67; 53 Am. Dec. 771, and extended note; *Petrie v. Columbia etc. R. R. Co.*, 27 S. C. 63; *Oil City etc. Supply Co. v. Boundy*, 122 Pa. St. 449.

CORPORATION—LIABILITY OF PLEDGERS OF STOCK FOR CORPORATE DEBTS. A person to whom stock of a corporation is issued, and in whose name it stands on the corporation books as the owner, is in some of the states liable to the creditors of the corporation as though he were the absolute owner, although he was in fact a pledgee, agent, or trustee of the true owner: *Baines v. Babcock*, 95 Cal. 581; 29 Am. St. Rep. 158, and note. See also the extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 829.

SALES—INTENT.—The passing of title upon a sale of chattels depends upon the intent of the parties derived from the contract and the circumstances: *Commonwealth v. Hess*, 148 Pa. St. 98; 33 Am. St. Rep. 810.

LOWENBERG v. GREENEBAUM.

[99 CALIFORNIA, 162.]

EXECUTION.—A BROKER'S SEAT IN A STOCK AND EXCHANGE BOARD is not subject to levy and sale under execution.

Edward R. Taylor, John R. Jarboe, and W. S. Goodfellow, for the appellants.

Wal. J. Tuska, for the respondent.

163 MCFARLAND, J. Judgment went in the court below for plaintiff; and defendants appeal from the judgment and from an order denying a new trial.

In January, 1888, Simon Kullman recovered a money judgment for several thousand dollars against the defendant in the present action, Jacob Greenebaum; and on September 23, 1889, an ordinary writ of execution was issued on said judgment. The sheriff undertook, under said writ, to levy upon and sell as personal property the "seat" of said Greenebaum in an association known as the "San Francisco Stock and Exchange Board." He endeavored to accomplish this in the following manner: He delivered to the president and secretary of said association a copy of the said execution "together with a notice that all moneys, credits, and effects of the defendant, Jacob Greenebaum, in the possession or under the control of the said San Francisco Stock and Exchange Board, together with the seat, interest and shares of the defendant, Jacob Greenebaum, in and to the San Francisco Stock and Exchange Board, were levied upon by virtue of said writ." He then advertised the said seat, interest, etc., for sale for a period of six days; and on October 16, 1889, he sold the same to William Lowenberg, the plaintiff herein—he being the highest bidder. On the same day the sheriff gave to plaintiff a certificate of sale which, after reciting the above facts, certifies that the sheriff had sold to plaintiff "all the right, title, and interest of Jacob Greenebaum, one of the defendants, in and to the San Francisco Stock and Exchange Board, and the seat, interest, and shares of the said Jacob Greenebaum in the San Francisco Stock and Exchange Board."

On said October 16th the plaintiff herein served a notice **164** directed to said stock board upon its president, which, after reciting said sale, demanded "to be admitted to the enjoyment and participation of all the rights, privileges, and

interests heretofore enjoyed by the said Jacob Greenebaum in your board and in the property thereof," and that an accounting be had, etc. The board paid no attention to the demand, and said Greenebaum has ever since continued to occupy his seat, with all its rights and privileges, in said board. Afterwards, on March 12, 1890, plaintiff brought this present action against said Greenebaum, making the said stock board and also a corporation called the Company of Associated Stock Brokers parties defendant. The purpose of the action is to have plaintiff's title to said seat and rights appurtenant thereto quieted, a receiver appointed, an injunction issued, etc. Plaintiff rests his title wholly upon said asserted levy and sale by said sheriff under said writ of execution as aforesaid; but we do not think that by said sheriff's sale the said seat of said Greenebaum in said stock board, or any rights dependent thereon, were conveyed to plaintiff.

The said San Francisco Stock and Exchange Board is a voluntary association without capital stock or shares. The findings, and an agreed statement of facts, set forth very fully its constitution and by-laws, and show very clearly its character and purposes. There are stock boards in other American cities very similar to the one here in question, and they all seem to have been framed upon the same model. It is sufficient to state here a few of the features of the San Francisco Stock and Exchange Board, as follows: It is a voluntary association, consisting of not more than one hundred persons; it does not itself do any stock business, but its purpose is to afford facilities for its members doing such business, each individually for himself; each member has a "seat" in the board, and his seat represents and is the sole basis of his rights in said board, and entitles him to a place in the room provided by the association for the use of its members, to participate in its meetings, and to therein transact his individual business as a stockbroker; occasionally the board, as an incident to its purpose of providing a place for the meeting of its members, has a surplus of money over its expenses, and sometimes divides said surplus among its members, and the owner of a seat is entitled to his proportion of such surplus ¹⁶⁵ when a dividend is declared; no person can become a member of said association, or be entitled to a seat therein, except he be elected by the members of the association according to its constitution and by-laws, under which "ten negative votes shall exclude"; its constitu-

tion declares that no member shall have any individual right or title to any of the property or assets of the association until after its dissolution and the final winding up of its affairs by "its then remaining members"; if a member in good standing desires to retire, he cannot dispose of his seat except to a person whom the association shall elect to become a member; and at no time since the organization of the association has any member been authorized to sell his seat "upon any terms whatever except to such person as shall have been personally elected to membership in said association by the remaining members thereof."

There are many other features of the association not necessary to be here especially mentioned; the foregoing gives a clear notion of its general character. The plaintiff was never elected a member, and the association has always refused to recognize him in any way. The defendant, Greenebaum, remains in possession of the said seat, and is recognized as the lawful occupant thereof by the association.

An attempted voluntary sale of the seat by Greenebaum to Lowenberg, the latter not having been elected a member of the board, and the association not having consented to the sale, would not have transferred the title to the seat, or to any of its incidents; and it is difficult to see how a simple sale under execution transferred something which the judgment debtor himself could not have transferred: Freeman on Executions, sec. 112, and cases there cited. Moreover, a creditor cannot have property of a debtor applied to the satisfaction of a debt except in the way provided by law; and there is no way provided by law by which such an intangible thing as a seat in the stock board above described—that is, a personal privilege of being and remaining a member of a voluntary association with the assent of the associates—can be levied upon and sold under execution. Section 688 of the Code of Civil Procedure provides that property may be levied upon under a writ of execution "in like manner as upon writs of attachment"; and section 542 provides what property may be taken on a writ of attachment, and in what manner various kinds of property may be so taken. But there is not in any subdivision of section 542 a method provided for attaching such a thing as this seat in a stock board. In *Pacific Bank v. Robinson*, 57 Cal. 523, 40 Am. Rep. 120, this court expressly held that a patent right is not tangible property which is the subject of seizure and sale on execution; and a seat in the stock board

is certainly not more tangible than a patent right, for the latter can at least be sold and transferred by its owner at his own will, while the former cannot. The only case directly in point cited by counsel on either side is that of *Pancoast v. Gowen*, 93 Pa. St. 71. There a seat in a stock board similar to the one in question here had been levied upon under execution, and the court say: "A seat in a board of brokers is not property subject to execution in any form. It is a mere personal privilege, perhaps more accurately a license to buy and sell at the meetings of the board. It certainly could not be levied on and sold under a *feri facias*. The sheriff's vendee would acquire no title which he could enforce": See also *Freeman on Executions*, sec. 110.

Whether the respondent, by a creditor's bill in chancery, or by proceedings supplementary to execution under our code, could reach appellant's right to a seat in the board is a question not now before us. We merely hold that respondent did not acquire title to that seat, or to its incidents or appurtenances, by virtue of the execution sale hereinbefore mentioned. And under these views it would be useless to inquire into the relations between the San Francisco Stock and Exchange Board and the other appellant, the Company of Associated Stock Brokers. As the respondent has no title to said seat he has no interest in those relations.

The judgment and order appealed from are reversed.

FITZGERALD, J., and DE HAVEN, J., concurred.

EXECUTION—SEAT IN STOCK BOARD.—As to whether a broker's seat in a stock and exchange board is subject to execution sale, see *Habicht v. Lieant*, 78 Cal. 351; 12 Am. St. Rep. 63, and note.

ROWE v. BLAKE.

[30 CALIFORNIA, 187.]

JUDGMENT OF FORECLOSURE, ACTION UPON.—An action can be maintained to enforce a judgment for the foreclosure of a mortgage. The plaintiff's remedy is not restricted to taking out an execution and selling the property under the original judgment.

James D. Thornton and J. D. Henderson, for the appellant.

William H. Fifield, for the respondents.

160 HARRISON, J. December 31, 1879, judgment was entered in the late twenty-third district court of the city and

county of San Francisco, in favor of the plaintiff and against the defendants, in which the amount of the indebtedness of the defendant Blake to the plaintiff was ascertained and declared to be a lien upon certain lands, and directing a sale of the lands to satisfy the said indebtedness. This judgment was entered of record January 26, 1880, and on the 30th of December, 1884, the plaintiff brought the present action, and in the amended complaint therein alleges "that said judgment and decree has not been satisfied, in whole or in part, by execution or otherwise, and said property has not been sold, and said judgment and decree is still in full force and of binding effect, unmodified, and unreversed," and asks for a judgment that the lands therein described be sold to satisfy the amount of said indebtedness. The defendants demurred to this complaint upon the ground that it does not state facts sufficient to constitute a cause of ¹⁷⁰ action, and, their demurrer having been sustained, judgment was entered in their favor, from which the plaintiff has appealed. The amended complaint contains also averments of certain facts in excuse of the delay in prosecuting the action, some of which have supervened since the filing of the original complaint, and to which defendants have demurred on the ground of uncertainty; but in the view we take of the case it is unnecessary to consider either these averments or the demurrers thereto.

It is contended by the respondents that an action cannot be maintained in this state to enforce a judgment for the foreclosure of a mortgage; that the only remedy of the plaintiff in such judgment is its enforcement by a sale within five years from its entry; and, that failing to effect such sale, the judgment ceases to be operative. In *Ames v. Hoy*, 12 Cal. 11, it was held that an action could be maintained in this state upon a domestic judgment; and in *Stuart v. Lander*, 16 Cal. 373, 76 Am. Dec. 538, it was held that such an action would lie, although the time within which an execution might issue had expired. Respondents seek to distinguish these cases from the present by the fact that they were brought to recover a specific sum of money that had been fixed by the prior judgment, whereas the present action is brought to procure a sale of the same property which the prior judgment directed to be sold. We are unable, however, to perceive any substantial reason for denying the right to maintain this action that would not be applicable in the other cases. There is certainly nothing in the opinion in

Ames v. Hoy, 12 Cal. 11, that warrants such distinction. It is there said: "The chief argument is that there is no necessity for a right of action on a judgment, inasmuch as execution can be issued to enforce the judgment already obtained, and no better or higher right or advantage is given to the subsequent judgment. But this is not true in fact, as in many cases it may be of advantage to obtain another judgment in order to save or prolong the lien." The Code of Civil Procedure defines a civil action as a proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, and declares that it arises out of an obligation by which one person is bound to do or not to do a certain thing: Code Civ. Proc., secs. 22, 25, 26. Whether the judgment be regarded as ¹⁷¹ the evidence of a contract between the parties, or as the creation of an obligation upon the defendant, the correlative right of the plaintiff which is created thereby may be enforced by a civil action.

By the former judgment it was determined that the plaintiff had the right to have the land therein described sold for the purpose of paying the indebtedness of the defendant Blake, and there was also created thereby an obligation upon the defendant to subject the land to a sale for the satisfaction of this indebtedness, and this obligation is as well defined and as binding upon the defendant as is the obligation upon a defendant to pay the amount of a money judgment recovered against him. The obligation upon a defendant to pay a specific sum of money out of his general estate, which an ordinary money judgment implies, differs in kind rather than in nature from the obligation to subject a specific parcel of land to the payment of a specific sum of money, and the reasons for enforcing this implied obligation or promise by an action are as cogent in the one case as in the other.

The judgment herein sought to be enforced has nothing in its terms, nor is there anything in the statutes of this state which limits the mode for its enforcement. The provisions of section 681 of the Code of Civil Procedure, limiting the issuance of an execution for the enforcement of a judgment to the term of five years, is but a limitation upon a certain mode for its enforcement, and does not purport to limit or qualify the right to its enforcement in any other mode. The right to bring an action upon a judgment or decree is recognized by that code as the subject of a civil action, and may

be brought within five years: Code Civ. Proc., sec. 336. The provisions of this section are applicable to domestic judgments (*Mason v. Cronis*, 20 Cal. 211), and the time thus limited begins to run from the entry of the judgment: *Trenouth v. Farrington*, 54 Cal. 273.

Under the chancery practice bills to carry decrees into execution were frequently entertained: Story on Equity Pleading, sec. 429; 2 Daniell's Chancery Practice, p. *1585. As in this state there is only one form of civil action for the enforcement of a private right (Code Civ. Proc., sec. 307), the rules which under a former system prevented the enforcement of a ¹⁷³ decree in equity by a proceeding at law are inapplicable. The action of *Ames v. Hoy*, 12 Cal. 11, was based upon a decree rendered in a suit in equity.

The judgment is reversed.

DE HAVEN, J., and GAROUTTE, J., concurred.

Hearing in Bank denied. —

JUDGMENTS—ACTIONS ON.—An action may be maintained on a domestic judgment: *Merchants' Nat. Bank v. Gaslin*, 41 Minn. 582. An action may be maintained in the same court in which the judgment was rendered, while it is in full force and effect: *Simpson v. Cochran*, 23 Iowa, 81; 92 Am. Dec. 410, and note; *Hummer v. Lamphear*, 32 Kan. 439; 49 Am. Rep. 491. A judgment is not affected by an execution sale that passes no title, and after such a sale may be the subject of an action of debt: *Townsend v. Smith*, 20 Tex. 466; 70 Am. Dec. 400, and note. Though erroneous, an action may be maintained on a judgment, and the plaintiff may recover thereon, if it has not been reversed or set aside: *Bruce v. Cloutman*, 45 N. H. 37; 84 Am. Dec. 111. See also the notes to the following cases, where this subject will be found further treated: *Kingland v. Forrest*, 52 Am. Dec. 224; *Lee v. Giles*, 21 Am. Dec. 479, and *Burns v. Tatum*, 11 Am. Dec. 722.

IN RE ROBB.

[30 CALIFORNIA, 202.]

EXECUTION—EXEMPTION OF TOOLS.—A LATHE and the appliances used in running it are exempt from execution under a statute purporting to exempt the tools and implements of a mechanic necessary to carry on his trade.

EXEMPTIONS.—EXEMPTION IN FAVOR OF A MECHANIC IS OPERATIVE though he uses the tool claimed as exempt in manufacturing machinery, if he uses it himself without employing others to use it in such manufacture.

H. H. Lowenthal, for the appellant.

James P. Langhorne, for the respondent.

²⁰³ **TEMPLE, C.** This is an appeal by an assignee in insolvency from an order made on the petition of the insolvent setting aside as exempt from execution a lathe and certain appliances used in running the lathe.

The insolvent is a mechanic and machinist.

Section 690 of the Code of Civil Procedure provides: "The following property is exempt from execution. . . .

"4. The tools or implements of a mechanic necessary to carry on his trade," etc.

It is contended that a lathe is not a tool or implement required by a mechanic, and evidence was given to the effect that a journeyman machinist when working for others is not usually required to provide an implement of that character. This evidence tended simply to show that such a tool or implement is not necessary for a mechanic who is a machinist while employed as a journeyman; but the law does not require that a mechanic shall be employed as a journeyman in order to be entitled to the exemption. Nor is the phrase "necessary to carry on his trade" used in such strict sense that because some journeyman machinist can get employment with a manufacturer who will supply the implement, therefore it is not necessary to the trade within the meaning of the statute.

The implement in question, according to the testimony of the claimant, was necessary to carry on his business as a mechanic and machinist, and is a tool used for shaping wood or metal, cost about two hundred and fifty dollars, was run by man-power, one man easily turning it, and was a tool ordinarily and necessarily used by mechanics and machinists in their trade.

Appellant also contends that the insolvent was a manufacturer and not a mechanic. The insolvent testified that he used ²⁰⁴ the lathe to manufacture machinery. What machinery he manufactured or upon what terms is not shown. He did not employ others to use the tool or implement in manufacturing. It was used by himself. Many mechanics who would be clearly entitled to the exemption are manufacturers; tailors, for instance. Suppose he was doing piece-work for some establishment? In such case I see no reason why he would not be as clearly a mechanic as a journeyman who worked in the establishment and had such tools supplied by the manufacturer.

I think the order should be affirmed.

VANCLIEF, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion, the order is affirmed.

McFARLAND, J., DE HAVEN, J., FITZGERALD, J.

EXECUTION—EXEMPTION OF NECESSARY TOOLS OF OCCUPATION.—See the extended notes to *Kilburn v. Demming*, 21 Am. Dec. 545; *Richards v. Hubbard*, 47 Am. Rep. 190, and *Baker v. Willis*, 25 Am. Rep. 63, also the notes to *Files v. Stevens*, 30 Am. St. Rep. 334, and *In re McMann*, 23 Am. St. Rep. 253, in which this question is thoroughly discussed.

HERRLICH v. KAUFMANN.

[99 CALIFORNIA, 271.]

CREDITOR'S BILLS.—PROCEEDINGS SUPPLEMENTARY TO EXECUTION, authorized by the statutes of California, are a substitute for creditor's bills, and supplant proceedings in equity, unless some special ground exists upon which to invoke the power of chancery.

EXECUTION—ACTION AGAINST GARNISHER.—If, under execution, a debtor of the defendant is garnished, no action can be sustained by a judgment creditor against such debtor. The only remedy is the one provided by proceedings supplemental to execution, under which, by the statute of California, the creditor must obtain an order for the debtor of the defendant to appear and answer, and upon such appearance, if the debt is admitted, an order may be made for its payment into court; and if the debt is denied, an order may be entered authorizing the judgment creditor to institute an action to recover the alleged debt.

A CREDITOR'S BILL CANNOT BE SUSTAINED UNLESS it is shown that the remedies at law have been exhausted, or must be unavailing.

Garber, Boalt, and Bishop, for the appellant.

Charles F. Hanlon, for the respondents.

²⁷² McFARLAND, J. John McKenzie was a stockbroker, and on December 8, 1886, made an assignment for the benefit of his creditors to the defendant, C. H. Kaufmann, pursuant to the provisions of the Civil Code on the subject. Prior and down to the assignment McKenzie had been doing a stock business with one Margaret McDonald, and owed her, or some one for whom ²⁷³ she was acting, several thousand dollars. Julie Herrlich, the plaintiff in the case at bar, recovered a judgment (the date of which is in dispute) against said McDonald for six thousand two hundred and ten dollars and eighty-six cents; and on December 31, 1886, she had an execution issued upon said judgment, and under said execu-

tion a notice of garnishment was served on the defendant Kaufmann, notifying him that all moneys in his hands due Mrs. McDonald were levied upon and attached. There was another execution and notice of garnishment of a similiar character in December, 1887, and another in January, 1889. Thereafter, in February, 1889, this present action was commenced by said Julie Herrlich to recover from Kaufmann the amount alleged to be due to said Margaret McDonald on account of her dealings with McKenzie. Other parties were made defendants; and John F. Hanlon was made a plaintiff upon the allegation that he owned a fractional part of the judgment in the case of *Herrlich v. McDonald*. The court found that there was due to Mrs. McDonald upon her said stock business with McKenzie the sum of five thousand seven hundred and sixty-nine dollars and fifty-two cents, and judgment was rendered against Kaufmann for that amount, the judgment being "that the plaintiffs have and receive of and from the defendant C. H. Kaufmann, the sum of five thousand seven hundred and sixty-nine dollars and fifty-two cents, and that execution issue therefor." Kaufmann appeals from the judgment and from an order denying him a new trial.

Appellant contends that the complaint does not state facts sufficient to constitute a cause of action. He also makes a number of other points, as, for instance, that Kaufmann, being an assignee under the code, the money was *in custodia legis*, and not subject to levy; that Mrs. McDonald could not have maintained this action, and therefore, as plaintiffs can have no greater right by virtue of the garnishment than their judgment debtor had, they cannot maintain it; that the court erred in refusing to make certain assignees of Mrs. McDonald defendants; that as the notice of garnishment was served December 31, 1886, the cause of action founded on it was barred before the action was commenced; that the judgment in *Herrlich v. McDonald* was rendered in November, 1881, and was itself outlawed; and that various fatal errors were committed in rulings upon the admissibility of evidence; but these and other points made by appellant we do not deem it necessary to discuss, because, in our ²⁷⁴ opinion, the complaint does not state a cause of action. (It also appears that before the notice of garnishment, McDonald had made an assignment [claimed by respondent to be fraudulent] of her debt from McKenzie to one Scott, and notified Kaufmann thereof; that Scott assigned to one Potter, and Potter, in turn, to one Davis,

that one Knowlton, before said garnishment, commenced an action against McKenzie, Kaufmann, and others, praying that the various sums due the several creditors of McKenzie in Kaufmann's hands be ascertained; that the plaintiff herein intervened in said action, but afterwards withdrew her intervention, and that judgment was rendered therein that said Davis was entitled to the moneys sued for by plaintiffs in the case at bar. There are other complications, also, not necessary to be here mentioned.)

The complaint goes upon the theory that the plaintiff herein, Herrlich, having a money judgment against Mrs. McDonald, and having, upon an execution thereon, served Kaufmann with a notice of garnishment, thereby acquired as direct a cause of action against the latter as in any case where *indebitatus assumpsit* would lie. But this is not the law. There is, at common law, no privity between a judgment creditor and his debtor's debtor; there is no contract relation between them, and no relation of any kind which, of itself, gives the former a direct cause of action at law against the latter.

Formerly, assets of a judgment debtor which could not be effectively seized by the sheriff under an execution, such as a debt owing to the defendant, could be reached, upon a proper showing, through a court of equity by means of a creditor's bill or suit, but in this state, and in most of the other states, a legal remedy is afforded by statutes providing for proceedings supplementary to execution, and the general rule is that when there are such statutory proceedings they must be pursued.

The Code of Civil Procedure of this state, from section 716 to section 721, specifically provides how a judgment creditor may proceed against a debtor of his judgment debtor. Those sections provide, in brief, that after the issuing of an execution, upon a showing, by affidavit or otherwise, that a person is indebted to the judgment debtor in an amount exceeding fifty dollars, the judge may order such person to appear and answer concerning ²⁷⁵ such alleged indebtedness; if he admits the indebtedness he may be ordered to apply the amount thereof to the satisfaction of the judgment; if he denies any indebtedness, and the denial seems, after a hearing, to be *bona fide*, the court or judge may authorize the judgment creditor to institute a suit against such person to recover such alleged debt. Now, in the case at bar, the plaintiffs entirely ignored these statutory provisions; and without procuring an

order for appellant to appear and answer, and without any order authorizing them to commence an action against appellant, brought this suit upon the theory of a direct liability of appellant to them, as hereinbefore stated.

It has been several times held by this court that the statutory proceedings about proceedings supplementary to execution are a substitute for a creditors' bill. In *Adams v. Hackett*, 7 Cal. 201, the court say: "In reference to the chapter prescribing the mode of proceedings supplementary to execution, it seems clear that those provisions were intended as a substitute for what was called 'a creditors' bill.' This is so stated by the practice commissioners in their original note to this chapter in the New York code. The design was, in the language of those commissioners, 'to furnish a cheaper and easier method.' The different sections of this chapter when taken together form a consistent and harmonious whole; and when fairly and liberally carried out, afford a cheaper and easier method than the former one by creditors' bill."

In *Pacific Bank v. Robinson*, 57 Cal. 522, 40 Am. Rep. 120, the court say: "Proceedings under sections 714 to 721 and section 574 of the Code of Civil Procedure were intended as a substitute for the creditors' bill as formerly used in chancery: *Adams v. Hackett*, 7 Cal. 201; *Lynch v. Johnson*, 48 N. Y. 33. So that any property which was reached by a creditors' bill may now be reached by the process of proceedings supplementary to execution." In *Habenicht v. Lissak*, 78 Cal. 357, 12 Am. St. Rep. 63, the court say: "In *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120, it was held that the proceedings supplementary to execution are intended to take the place of the creditors' bill." See also *McCullough v. Clark*, 41 Cal. 302; *High v. Bank of Commerce*, 95 Cal. 386; 29 Am. St. Rep. 121; also, *Graham v. La Cross etc. R. R. Co.*, 376 10 Wis. 459; *Hexter v. Clifford*, 5 Col. 168; and (cases cited in note to *Lathrop v. Clapp*, 100 Am. Dec. 501, in support of the statement therein made that "in nearly all of the states these proceedings supplemental to execution are regarded as a substitute for the creditors' bill of the chancery practice." It is not necessary, however, to go to the length of saying that a creditors' bill could not be sustained here under any circumstances; for there might, perhaps, be cases in which the statutory proceedings would not afford adequate relief; but they must be pursued, unless in those exceptional cases in which it appears that equity must be invoked because legal

remedies are unavailing. The law is correctly stated in Freeman on Executions, section 394, where the author says that proceedings supplementary to execution "supplant proceedings in equity, unless some special ground exists upon which to invoke the power of chancery." And in the case at bar there was no such ground. "A code of procedure is usually understood as presenting remedies which are exclusive in their nature, and which, when applicable to the relief sought, exclude or supplant all other modes of redress": Freeman on Executions, sec. 394. And there is no need here of inquiring how strictly the statutory provisions must be followed, because in the case at bar there is no pretense that they were followed at all. The case of *Roberts v. Landecker*, 9 Cal. 262, cited by appellant, is not in point. In that case Landecker had been garnished on a writ of attachment, and it was averred that at the time of notice of garnishment he had in his possession goods of the defendant, which he afterwards fraudulently disposed of and converted to his own use. The Practice Act made the garnishee on attachment "liable to the plaintiff" for the property in his hands at date of garnishment, and the court construed this to mean a statutory liability upon which a direct action could be brought, and held that proceedings supplementary to execution did not apply to it; but there is no such provision respecting a garnishment upon execution, and the court makes the distinction. Speaking of the sections relating to proceedings supplementary to execution, the court in that case say: "There is nothing in the chapter concerning attachments that refers to these sections, and nothing in the proceedings supplementary to the execution ³⁷⁷ that properly applies to the peculiar circumstances of this case. . . . They (the plaintiffs) sue upon a statutory liability for the value of the property. The proceedings supplementary to execution have another object in view. They seek to subject the property itself to sale under execution, or the debt to collection." The provisions of the statute at that time were the same as those now embraced in the code.

But if it should be conceded that in a case like the one at bar the statutory provisions could be ignored and relief sought in a court of equity by means of a creditors' bill, still the complaint here is entirely insufficient. Before equity can be invoked in such a case it must be shown that remedies at law have been exhausted, or would be unavailing; and with cer-

tain exceptions, of which the case at bar is not one, a necessary averment in a creditors' bill is that an execution has been returned unsatisfied: *Pacific Bank v. Robinson*, 57 Cal. 522; 40 Am. Rep. 120; *Mesmer v. Jenkins*, 61 Cal. 153; *Harris v. Taylor*, 15 Cal. 349.) "When a judgment creditor desires to bring a creditors' bill for the purpose of reaching assets which are not subject to execution at law, he must generally take out execution upon his judgment, place it in the sheriff's hands, and wait till that officer makes a return thereon showing that he can find no property subject thereto. By this means he completely exhausts his legal remedies and shows that they are unavailing. Then and not before he may successfully invoke the aid of equity to reach equitable assets": Freeman on Executions, sec. 428, and notes. "It is a necessary result from the whole theory of the creditors' suits that jurisdiction in equity will not be entertained where there is a remedy at law": Pomeroy's Equity Jurisprudence, sec. 1415, and notes.

Now in the complaint in the case at bar there is not only a failure to aver the return of an execution *nulla bona* or at all, but there is an affirmative averment that the judgment debtor, Mrs. McDonald, has always been "fully able to pay the whole of said judgment and execution, and has and always has had ample moneys and properties to make said payment."

³⁷⁸ The judgment and order appealed from are reversed and the cause remanded.

FITZGERALD, J., and DE HAVEN, J., concurred.

Hearing in Bank denied. —

CREDITOR'S SUIT—EXHAUSTING REMEDY AT LAW.—A creditor must exhaust his legal remedies before applying to equity to aid him in subjecting the property of his debtor to the payment of his debt: *Mullin v. Hewett*, 103 Mo. 639; *Russell v. Chicago etc. Sav. Bank*, 139 Ill. 538; *Thurmond v. Reese*, 3 Ga. 449; 46 Am. Dec. 440, and note; *McGough v. Insurance Bank*, 2 Ga. 151; 46 Am. Dec. 382, and note; *Hopkins v. Joyce*, 78 Wis. 443. Equity is ancillary to law in aiding creditors by judgment and execution in our own courts where it is necessary for their satisfaction: *McLure v. Bencent*, 2 Ired. Eq. 513; 40 Am. Dec. 437; see also the extended note to *Quarl v. Abbott*, 52 Am. Rep. 673.

EXECUTION.—PROCEEDINGS SUPPLEMENTARY TO AS A SUBSTITUTE TO CREDITORS' BILLS is thoroughly discussed in the extended note to *Lathrop v. Clapp*, 100 Am. Dec. 501; see also *High v. Bank of Commerce*, 95 Cal. 336; 29 Am. St. Rep. 121, and note.

PEOPLE v. GLEASON.

[99 CALIFORNIA, 359.]

CRIMINAL LAW.—THE CRIME OF ATTEMPT TO COMMIT INCEST may be committed though the female upon whom the attempt was made did not consent, but on the contrary, resisted with force.

CRIMINAL LAW—INCEST, ATTEMPT TO COMMIT.—The overt acts necessary to constitute the crime of attempt to commit incest are sufficiently established when the evidence tends to prove that, but for the resistance of the female, incest would have resulted from the acts done and attempted.

Attorney-General W. H. H. Hart, for the appellant.

Carroll Cook, for the respondent.

259 VANCLIEF, C. The defendant was accused and found guilty of the crime of "attempt to commit incest" with his daughter, aged fourteen years and seven months. On motion of defendant, the court below granted him a new trial, and this appeal is by the people from an order granting a new trial.

The evidence, without any conflict, shows that the defendant, both by solicitation and overt acts, attempted to have carnal connection with his daughter; that the attempt proceeded to the extent of contact of sexual organs, lacking only penetration, to consummate the act; and that it was without her consent and against her will and active resistance.

It appears that the new trial has granted on the ground that the crime charged could not have been committed without the consent of the daughter; and the record shows no other ground upon which the order can be sustained.

Conceding that the consent of both parties to the carnal intercourse is necessary to constitute the crime of incest, it does not follow, as contended by counsel for respondent, that a man may not be guilty of the crime of attempting to commit incest, without the consent of the woman with whom he attempts to commit the latter crime. His intent to commit the crime of incest ²⁶⁰ and his concurrent overt acts in the use of means adapted to the immediate perpetration and consummation thereof, are sufficient to constitute a criminal attempt to commit the crime of incest; and the failure of such means to effect the purpose intended will not exculpate him.

There may be found some conflict of the authorities as to whether mere solicitation to commit incest, adultery, or sodomy is an adequate overt act in the composition of a crim-

inal attempt to commit either of those crimes; but that such overt acts as were proved in this case are sufficient there seems to have been no question. This conclusion, I think, is warranted by the text, and the authorities cited in chapter 51 of Bishop on Criminal Law, 8th ed., sections 723-772, especially sections 767 and 768.

I think the order should be reversed, and the cause remanded with directions to the court below to proceed to judgment on the verdict of the jury.

SEARLS, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, the order appealed from is reversed, and the cause remanded with directions to the court below to proceed to judgment on the verdict of the jury.

HARRISON, J., GAROUTTE, J., MCFARLAND, J.

INCEST.—CONSENT OF FEMALE, WHETHER NECESSARY: See the extended note to *Commonwealth v. Bakeman*, 41 Am. Rep. 249. The question of the consent or nonconsent of the female does not necessarily enter into the offense of incest. The prosecution may be maintained upon evidence that establishes her nonconsent: *Schoenfeldt v. State*, 30 Tex. App. 695. Rape, by forcible ravishment and incest, cannot be committed by the same act, as incest is accomplished by the concurring assent of two persons, while rape is committed through the impelling will of one: *State v. Jarvis*, 20 Or. 437; 22 Am. St. Rep. 141.

EX PARTE GOULD.

[99 CALIFORNIA, 360.]

WITNESSES.—A PERSON ACCUSED OF CONTEMPT OF COURT CANNOT BE COMPELLED to submit to examination as a witness on the hearing of an order to show cause why he should not be adjudged guilty of contempt and punished therefor, if the constitution of the state declares that no person shall be compelled, in any criminal case, to be a witness against himself.

CONTEMPT OF COURT IS A PUBLIC OFFENSE by the laws of California, punishable by indictment or information, as well as by summary proceedings provided by the code. Therefore, a proceeding to punish a contempt, though it is alleged to have been committed in a civil action, is a criminal action in which the accused cannot be compelled to testify against himself.

O. W. Cross and W. C. Van Fleet, for the petitioner.

R. E. Bevan, contra.

261 HARRISON, J. In an action pending in the superior court in and for the county of Yuba, wherein the county of

Sacramento is plaintiff and the petitioner one of the defendants, a writ of injunction was served upon the defendant requiring him to refrain from doing certain acts therein specified. While this writ was in full force the petitioner was charged before said court with having violated its terms, and was ordered to show cause why he should not be adjudged guilty of contempt therefor. Upon the hearing of this charge the court required the petitioner to be sworn as a witness, to which he objected upon the ground that he could not be compelled to be a witness against himself in the proceedings, for the reason that they were of a criminal nature. The court, however, overruled his objection and required him to be sworn as a witness, and he, acting under the advice of his counsel, still declining and refusing to be sworn for the aforesaid reason, the court adjudged him guilty of contempt and committed him to the county jail, there to remain until he should purge himself of said contempt by consenting to be sworn as a witness in said case, and to testify therein.

Article 1, section 13, of the constitution of this state, declares that: "No person shall be compelled, in any criminal case, to be a witness against himself." Section 1323 of the Penal Code provides that "a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself."

Contempt of court is a public offense, and by section 166 of the Penal Code is expressly declared to constitute a misdemeanor, and the refusal of a witness to be sworn is an offense committed in the presence of the court. It is none the less a criminal offense that the statute authorizes it to be punished by indictment or information as well as by the summary proceedings provided in sections 1209-1222 of the Code of Civil Procedure. By these provisions the procedure for the investigation of the charge is analogous to the criminal procedure, and the judgment against the person guilty of the offense is visited with fine, or imprisonment, or both—the essential elements of ³⁶³ a judgment for a criminal offense. "Contempt of court is a specific criminal offense. It is punished sometimes by indictment and sometimes in a summary proceeding, as it was in this case. In either mode of trial the adjudication against an offender is a conviction, and the commitment in consequence is execution": *Williamson's Case*, 26 Pa. St. 19; 67 Am. Dec. 374. "Although the alleged misconduct of the defendants occurred in the progress of a civil

action, the proceeding to punish them for such misconduct is no part of the process in the civil action, but is in the nature of a criminal prosecution. Its purpose is not to indemnify the plaintiff for any damages he may have sustained by reason of such misconduct, but to vindicate the dignity and authority of the court. It is a special proceeding, criminal in character, in which the state is the real plaintiff or prosecutor": *Haight v. Lucia*, 36 Wis. 360. In *Ex parte Hollis*, 59 Cal. 408, it was said: "To adjudge a party guilty of contempt of court, for which he is fined and imprisoned, is to adjudge him guilty of a specific criminal offense. The imposition of the fine is a judgment in a criminal case": See also *Ex parte Kearny*, 7 Wheat. 38; *Ex parte Crittenden*, 62 Cal. 534; *New Orleans v. Steamship Co.*, 20 Wall. 387; *In re Mullee*, 7 Blatchf. 23; *Rapalje on Contempts*, sec. 21. In *Boyd v. United States*, 116 U. S. 616, Justice Bradley has given an exhaustive and interesting historical discussion of the power of a court to compel a defendant in a criminal proceeding to give testimony against himself. In that case an information was filed against certain property for its confiscation under the revenue laws of the United States, and the claimants having been directed by the court to produce in evidence certain invoices for the purpose of establishing the claim of the government, objected thereto on the ground that the statute under which the order was made was in violation of the fourth and fifth amendments to the constitution. It was held that although the proceeding was *in rem* and in the nature of a civil proceeding, yet an action for the forfeiture of property for the violation of law is, in effect, a criminal proceeding, and that the owner of the goods, after making his claim, is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense, and ²⁶³ cannot be compelled to furnish evidence against himself. Personal liberty is, however, more sacred than mere rights of property, and the reasons for protecting the owner of property against being compelled to give evidence against himself in a proceeding for its forfeiture are in the same degree more cogent when his personal liberty is at stake. It was said by Justice Bradley in the case last cited: "Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than

in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be, *obsta principiis*."

We hold, therefore, that the court was not authorized to direct the petitioner to be sworn as a witness in the proceeding, and that its order adjudging him guilty of contempt for his refusal and punishing him therefor was without authority, and that the petitioner should be discharged, and it is so ordered.

DE HAVEN, J., McFARLAND, J., and FITZGERALD, J., concurred.

CONTEMPT A CRIMINAL OFFENSE.—A contempt proceeding instituted for the purpose of vindicating the dignity and preserving the power of the court is criminal and punitive in its nature: *Thompson v. Pennsylvania R. R. Co.*, 48 N. J. Eq. 105; *State v. Cunningham*, 33 W. Va. 607; *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263, and note; *Ex parte Robertson*, 27 Tex. App. 628; 11 Am. St. Rep. 207, and note. A proceeding against an attorney as an officer of the court for contempt is a proceeding for a criminal offense: *State v. Ralphsyder*, 34 W. Va. 352.

WITNESS—PRIVILEGE—CONTEMPT.—A party cited for contempt in inducing witnesses to absent themselves from court is charged with a statutory crime in addition to the contempt, and cannot be compelled as a witness to prove contempt and thus criminate himself as to the other crime: *In re Nickell*, 47 Kan. 734; 27 Am. St. Rep. 315, and note.

IN RE JAMES.

[99 CALIFORNIA, 874.]

A DECREE OF DIVORCE REGULARLY OBTAINED IN ONE STATE BY A CITIZEN THEREOF against a nonresident, constructively served with process in the action and without other notice, and which is valid in the state where rendered, is equally valid in a sister state.

JURISDICTION.—A JUDGMENT UPON A DEFECTIVE COMPLAINT CANNOT BE COLLATERALLY attacked because of such defect. The action of the court in expressly or impliedly determining the complaint to be sufficient, and rendering judgment thereon in accordance with its prayer, can be nothing more than error. It is sufficient that the complaint informs the court and the defendant of the relief demanded and of the facts upon which the right to such relief is based.

A JUDGMENT RECORD OF ANOTHER STATE MAY BE COLLATERALLY IMPRACHED by extrinsic evidence showing that the court pronouncing the judgment did not have jurisdiction, though the record recites the existence of the jurisdiction sought to be disproved.

JUDGMENT OF COURT OF SISTER STATE.—If THERE IS A SUBSTANTIAL CONFLICT OF EVIDENCE as to the facts necessary to sustain the jurisdiction of a court of another state to pronounce the judgment relied upon, the implied finding of the trial court in favor of such jurisdiction and the facts necessary to support it, will not be reviewed upon appeal.

JURISDICTION, DEFECT IN OBTAINING.—THERE IS A CLEAR DISTINCTION BETWEEN an entire want of jurisdiction and an irregularity in some one of the steps taken to obtain it. If the statute concerning constructive service of process upon nonresidents in suits for divorce authorizes an order to be made by the clerk of the court in vacation, and to be published as in such statute designated, the fact that the clerk fails to sign the order, which he makes and enters in the proper book in his office, is a mere irregularity, and a judgment based upon due publication of such order is valid.

DIVORCE FROM BED AND BOARD, EFFECT UPON PARTY ALREADY DIVORCED. If after a divorce has been granted to a husband, he returns to the state where his former wife is, and is there sued by her for a divorce from bed and board, and a judgment is entered in her favor without his interposing his divorce by a plea in bar or otherwise, this second divorce does not invalidate the first, nor change his *status* of an unmarried man established by his divorce, and therefore in a contest between his wife and a woman married to him after the entry of both decrees of divorce, his first divorce is still operative and sustains the second marriage.

Horace W. Philbrook, for the appellant.

Z. N. Goldsby and Joseph H. Skirm, for the respondent.

375 DE HAVEN, J. This proceeding was commenced in the superior court of Santa Cruz county under the provisions of section 1888 of the Code of Civil Procedure, and the petitioner therein, Sarah M. James, appeals from an order of that court refusing to revoke letters of administration theretofore issued to the respondent, Leonora A. James, upon the estate of William E. James, deceased, and also refusing to grant letters of administration upon the said estate to the petitioner.

The petitioner and the respondent each claims to be the widow of the deceased, and these conflicting claims present the general question which the court is required to determine at this time.

The petitioner, Sarah M. James, was married to the deceased in the state of New York, in the year 1859, and they lived together in that relation until 1871, when they separated. Thereafter James went to Missouri, and on May 18, 1874, commenced in one of the circuit courts of that state an action against petitioner for a divorce, and on July 8, 1874, obtained a decree purporting to dissolve the bonds of matrimony theretofore existing between himself and the petitioner. The petitioner here was, during all the time of the pendency

of the divorce proceedings, a resident of the state of New York, and had no actual knowledge of the pendency of that action, the process therein having been served by publication only. James subsequently became a resident of this state, and in February, 1888, married the respondent, then Leonora A. King, in the county of Santa Cruz, in this state, and thereafter they lived together as husband and wife until about the time of his death, which occurred in April, 1887.

It will be seen from the foregoing statement that the decision of this case must turn upon the question of the validity of the decree of divorce which the deceased obtained in the state of Missouri, and as to what effect shall be given to it in this state.

While there is some conflict in the decisions upon this point, we entertain no doubt that a decree of divorce which has been ³⁷⁶ regularly obtained in one state, by a citizen thereof, against a nonresident defendant constructively served with process in the action, and without other notice, and which is valid and effectual in the state in which such decree is rendered, is equally valid in a sister state: *Ditson v. Ditson*, 4 R. I. 87; *Leith v. Leith*, 39 N. H. 20; *Gould v. Crow*, 57 Mo. 200; 2 Bishop on Marriage and Divorce, 6th ed., secs. 156, 157, 199 *c.* See also *Pennoyer v. Neff*, 95 U. S. 784, 735; *Cheesly v. Clayton*, 110 U. S. 701.

We do not understand the appellant to question this proposition, but her contention is that the decree referred to is absolutely void: 1. Because the complaint in the action in which the decree was given did not state sufficient facts to entitle the plaintiff therein to a divorce; 2. That the court did not have jurisdiction to render it, for the reason that the deceased was not a resident of the state of Missouri for one year next before the commencement of the action resulting in the decree, such residence being necessary under the laws of that state in order to give its courts jurisdiction in actions for divorce; and 3. Because no process was ever issued in the action. These objections will be noticed in their order:

1. The attack here made upon the judgment in *James v. James* is collateral, and it is well settled that the judgment of a court having general jurisdiction of the subject matter involved in the judgment cannot be successfully attacked in a collateral proceeding because of an imperfect or defective complaint in the action in which it was rendered. If the facts stated in the complaint are not sufficient to entitle

the plaintiff to the relief demanded therein and awarded by the judgment, the action of the court in deciding otherwise and rendering its judgment in accordance with the prayer of the complaint can be nothing more than error: *Head v. Daniels*, 38 Kan. 1; *Rowe v. Palmer*, 29 Kan. 337; *Frankfurth v. Anderson*, 61 Wis. 107; Van Fleet's Collateral Attack, sec. 61. See also *Blondeau v. Snyder*, 95 Cal. 521.

The complaint in *James v. James* was sufficient to inform the court and the defendant therein of the relief which the plaintiff demanded and of the facts upon which he based his right to the relief sought, and this was all that was necessary in the way ²⁷⁷ of a statement of facts to give the court jurisdiction of the subject matter of the action.

2. In regard to the second ground of objection to the decree in *James v. James*, we agree with appellant that it is competent to collaterally impeach the record of a judgment rendered in another state by extrinsic evidence showing that the facts necessary to give the court pronouncing it jurisdiction to proceed did not exist; and this is true, although the record sought to be impeached may recite the existence of such jurisdictional facts: *Thompson v. Whitman*, 18 Wall. 457; *Grover and Baker Machine Co. v. Radcliffe*, 137 U. S. 287; *Starbuck v. Murray*, 5 Wend. 148; 21 Am. Dec. 172; *Eager v. Stover*, 59 Mo. 87. But in this case there was a substantial conflict in the evidence as to whether or not the deceased was a *bona fide* resident of the state of Missouri at the time and for one year prior to the commencement of the divorce proceeding there, and, this being so, we cannot disturb the implied finding of the court below to the effect that he was such a resident, and had resided in the state for the length of time alleged in his complaint in that action.

3. The laws of the state of Missouri in regard to the constructive service of process upon nonresident defendants in actions for divorce were introduced in evidence, from which it appears that the process prescribed in such cases is an order made by "the clerk or court in vacation . . . directed to the nonresidents or absentees, notifying them of the commencement of the action, and stating briefly the object and general nature of the petition," etc., such order to be published for four weeks "in some newspaper . . . which the court, judge, or clerk making the order may designate as most likely to give notice to the person to be notified." The order directing the defendant to appear in the divorce pro-

ceedings of *James v. James* was made by the clerk of the court in vacation. In form and contents it complied with the statute, and was entered by him in the proper book of record kept in his office, but the name of the clerk was not signed to such entry. The copy of the order as published purported to be attested by the clerk, with the seal of the court, and was published in the paper named in the order for the length of time required by the order and the laws of the state of Missouri.

278 Upon this state of facts the appellant contends that no process was ever issued in the action of *James v. James*, and that the order notifying the petitioner here to appear as defendant therein was absolutely void, because of the failure of the clerk to sign the same as entered by him in the records of the court, and that the default judgment taken against the petitioner here as defendant in that action was and is for this reason void in the broadest sense of that word, and must be so held in this collateral attack upon that judgment; but we do not think so. In the cases of *Wilson v. Owen*, 45 Ala. 451, *Costley v. Driver*, 45 Ala. 280, *Winnemore v. Mathews*, 45 Ala. 449, cited by appellant, and also in *Sheppard v. Powers*, 50 Ala. 377, it was held that a summons not signed by the clerk issuing it is invalid, and will not support a judgment by default. But the question arose in each of these cases upon a direct appeal from the judgment based upon such defective summons, and not in a collateral attack upon the judgment as in the case at bar. And as the rule in relation to the effect of errors or irregularities of practice in obtaining a judgment is not the same in the case of a direct appeal from the judgment, as when the judgment is collaterally assailed upon the same grounds, we do not regard the cases just referred to as any authority for the proposition that a judgment regular in all other respects must be held void when collaterally brought under review, because of such an infirmity in the process upon which it is based. There is a clear distinction between the entire want of jurisdiction and an irregularity in some one of the steps taken in obtaining jurisdiction. In the former case the judgment is absolutely void at all times, and whenever brought forward or called in question, but in the latter case the judgment is valid until reversed or set aside.

"No principle of law," says Mr. Black in his work on Judgments, "is more firmly settled than that a judgment of a court of competent jurisdiction, so long as it stands in full

force and unreversed, cannot be impeached in any collateral proceeding on account of mere errors or irregularities not going to the jurisdiction": 1 Black on Judgments, sec. 261. See also 1 Freeman on Judgments, 4th ed., sec. 126. In the case of *Ambler v. Leach*, 15 W. Va. 677, the court, in a careful ³⁷⁹ opinion reviewing many cases, reached the conclusion that a summons, otherwise regular, is not absolutely null and void because not signed by the clerk, and that a judgment by default based thereon should not be held invalid upon a collateral attack.

It is true that in the judgment held good in the case just mentioned the defective summons was personally served upon the defendant, while in the judgment now under consideration the service was by publication, but we do not regard this difference as material to the question we are now discussing. The order, as actually published in the case of *James v. James*, was full and complete, and purported to be attested by the proper officer, and we think that the neglect of the clerk to sign his name at the foot of the order entered by him in the proper book kept for the entry of such orders should be treated in this collateral attack upon the judgment based on such order as a mere clerical omission in a matter more of form than substance, and such as was certainly cured by the entry of the judgment. The order was, in fact, made when it was entered in the records of the court, and while it would have been more regular to have authenticated it with the signature of the clerk, the irregularity was not of such vital character as to deprive the court of jurisdiction to enter the judgment which it did, based upon the constructive service of process, of which that order was a material part.

4. It also appears from the record before us that after the rendition of the decree of divorce, James returned to the state of New York, and the petitioner here brought an action against him to obtain a divorce from bed and board, and in October, 1874, obtained such a judgment against him, and it was also further adjudged in that action that he pay to her for the support of herself and children twenty-five dollars per week and costs of the action. The validity of the decree of divorce obtained by James in the state of Missouri was not directly put in issue in that action, and there is nothing in the record to indicate that it was ever brought to the attention of the court of New York rendering this latter judgment. We do not think that the judgment just referred to, although it is

necessarily based upon the fact that the parties thereto were then at its date husband and wife, is a bar to the right of the respondent to assert in ³⁸⁰ this proceeding the binding force of the former decree of divorce rendered in the state of Missouri in the case of *James v. James*, and the lawfulness of her subsequent marriage to the deceased in this state. The decree of divorce obtained by the deceased in Missouri was valid, and established the status of the deceased as an unmarried man, leaving him free to again enter into the marriage relation with any other person consenting thereto. His failure to plead the judgment of divorce in bar of the subsequent action brought by the petitioner for the separation from bed and board, and the judgment of the court of New York decreeing such separation, did not have the effect to change the status of deceased from that which was given him by the decree of divorce rendered in the state of Missouri. After that decree, and until reversed or vacated by some appropriate proceeding, his status as a single man could not be changed without his consent.

Judgment and order affirmed.

FITZGERALD, J., and MCFARLAND, J., concurred.

Hearing in Bank denied.

MARRIAGE AND DIVORCE—DECREE OF DIVORCE AGAINST NONRESIDENT BY PUBLICATION OF SUMMONS.—An action for divorce is a proceeding *in rem*, so far as the status of the parties and the custody of minor children are concerned, and a service of process by publication on a nonresident defendant is good: *Estate of Newman*, 75 Cal. 213; 7 Am. St. Rep. 146, and note; note to *Loker v. Gerald*, 34 Am. St. Rep. 254. A decree of divorce granted in a foreign country in which the defendant did not reside, in an action in which he did not appear and in which process was not personally served upon him in such country, is void: *De Mell v. De Mell*, 120 N. Y. 485; 17 Am. St. Rep. 652, and note. See, on this point, *St. Sure v. Lindesfeld*, 83 Wis. 346; 33 Am. St. Rep. 50, and note. For a further discussion of the jurisdiction of courts to render judgments of divorce against nonresident defendants see the notes to the following cases: *Rigney v. Rigney*, 24 Am. St. Rep. 468; *Watkins v. Watkins*, 21 Am. St. Rep. 219; and *Jones v. Jones*, 2 Am. St. Rep. 453.

JUDGMENTS—COLLATERAL ATTACK FOR WANT OF JURISDICTION OF COURT RENDERING.—A decree rendered without jurisdiction cannot bind or estop any one, and may be collaterally attacked: *Ferguson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808, and note; *Wall v. Wall*, 123 Pa. St. 545; 10 Am. St. Rep. 549. A judgment can be collaterally attacked for want of jurisdiction when such want of jurisdiction appears affirmatively on the records: *Williams v. Haynes*, 77 Tex. 283; 19 Am. St. Rep. 752, and note; *Willkerson v. Schoonmaker*, 77 Tex. 615; 19 Am. St. Rep. 803, and note. See the extended note

to *Morrill v. Morrill*, 23 Am. St. Rep. 104; also the note to *Hardy v. Beaty*, 31 Am. St. Rep. 87.

JUDGMENTS—COLLATERAL ATTACK FOR ERROR.—A judgment is not subject to collateral attack for errors committed by the court in the course of the proceedings: *Taylor v. Coots*, 32 Neb. 30; 29 Am. St. Rep. 426; *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95, and extended note. A judgment rendered by a court of competent jurisdiction cannot be collaterally attacked on the ground that the affidavit for publication is insufficient: *Hardy v. Beaty*, 84 Tex. 562; 31 Am. St. Rep. 80, and note.

JUDGMENTS—JURISDICTION—COLLATERAL ATTACK.—A domestic judgment of a court of general jurisdiction cannot be collaterally attacked in the courts of the same state by showing facts outside the record: *Edgerton v. Edgerton*, 13 Mont. 122; 33 Am. St. Rep. 557, and note; *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263; *Ex parte Starnes*, 77 Cal. 156; 11 Am. St. Rep. 251, and note.

BLUMBERG v. BIRCH.

[99 CALIFORNIA, 418.]

JUDGMENT IN A SUIT TO FORECLOSE A MORTGAGE, BASED UPON CONSTRUCTIVE SERVICE OF PROCESS UPON A NONRESIDENT defendant, is valid, in so far as it directs a sale of the property and the application of the proceeds to the payment of the mortgage debt, but cannot authorize the docketing of a personal judgment against him for the amount of any deficiency.

JUDGMENT FORECLOSING A MORTGAGE—ACTION AGAINST DEFENDANT FOR DEFICIENCY.—If a judgment has been entered against a nonresident foreclosing a mortgage, such judgment being based upon the constructive service of process, and the sale of the mortgaged premises, as directed by the judgment, an action may be maintained against the defendant to recover the amount of a deficiency remaining after such sale, though the judgment was not a valid personal judgment, yet a part of the debt remains unpaid and constitutes an enforceable cause of action, and a complaint alleging all the facts is not subject to demurrer.

H. L. Poplin, for the appellant.

Orr and Hall, for the respondent.

418 **BELCHER, C.** It is alleged in the amended complaint in this case that on the thirteenth day of August, 1887, the defendant executed and delivered to the plaintiff his promissory note and a mortgage on certain real property to secure payment of the same; that on the 15th of December, 1890, the plaintiff commenced an action against the defendant in the superior court of Ventura county to foreclose the said mortgage, and that a summons in the action was issued and served on the defendant by publication only, he being then a nonresident of this state, and absent therefrom; that de-

fendant did not appear in the action, and, after the time allowed by law for him to appear and answer or demur, his default was duly entered by order of the court; that the court then heard proof of plaintiff's demand set out in his complaint, and examined him on oath respecting any payments that had been made on account ⁴¹⁷ of such demand, and thereupon made and entered in the action its decree of foreclosure in the usual form; that under this decree, on March 27, 1891, an order of sale was duly issued to the sheriff of the county, and in pursuance thereof the sheriff advertised for sale, and on April 27, 1891, sold, the said real property for the sum of one thousand dollars, and applied the same to the payment of the said indebtedness, interest, attorneys' fees, costs, and expenses, as directed by said decree; that, after so applying the said sum, there remained due and unpaid to the plaintiff on said indebtedness for principal and interest on the said note, and as determined by said decree, the sum of one thousand seven hundred and forty-six dollars and ninety-nine cents; that the sheriff's return being made showing such balance or deficiency, judgment was duly docketed therefor in favor of the plaintiff and against the defendant on April 28, 1891, and that no part of said sum had been paid. Wherefore the plaintiff demands judgment against the defendant for the sum of one thousand seven hundred and forty-six dollars and ninety-nine cents, with interest thereon, etc.

The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and his demurrer was sustained. Judgment was thereupon entered that the plaintiff take nothing, from which judgment he appeals.

There can be no doubt that the court, by the constructive service of the summons by publication in the foreclosure case, acquired jurisdiction to ascertain the amount secured by the mortgage and to make and enter a valid decree of foreclosure, directing a sale of the mortgaged property and the application of the proceeds to the payment of the amount so secured, including costs and expenses. It did not, however, thereby acquire jurisdiction to enter or docket a personal judgment against the defendant for any deficiency left unpaid by the proceeds of the sale: *Pennoyer v. Neff*, 95 U. S. 714; *Belcher v. Chambers*, 53 Cal. 639; *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34. But notwithstanding no valid judgment could

be entered for the deficiency, still, when properly ascertained, the deficiency constituted a subsisting indebtedness then due from the defendant to the plaintiff. The plaintiff brought this action to recover that indebtedness, and in his complaint set out all the facts on which he based his right of recovery, and the ⁴¹⁸ defendant's contention is that no sufficient cause of action was stated, because: 1. The personal judgment set out was void; and 2. The note was merged in the foreclosure judgment, and under section 726 of the Code of Civil Procedure no new or other action could be maintained thereon.

It is true that the personal judgment docketed against the defendant was void, and also that under the section of the code cited there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real or personal property. It does not follow, however, that after the mortgage security is exhausted, leaving a deficiency which is no longer secured, no new action on the note can ever be maintained. On the contrary, it has been held that an action may be maintained against an indorser of a note, payment of which has been secured by a mortgage given by the maker, to recover any deficiency resulting after a sale of the mortgaged premises under a judgment of foreclosure against the mortgagor: *Vandewater v. McRae*, 27 Cal. 596; *Allin v. Williams*, 97 Cal. 403. It seems to us, therefore, that, in a case like this, the amount realized from the proceeds of the sale may properly be treated as a payment on the note, and that an action thereon may be maintained to recover the balance left unpaid. But however this may be, it is clear and not disputed that the defendant was justly indebted to the plaintiff in some form for the amount of the deficiency, and, being so indebted, the familiar maxim of the law that where there is a right there is a remedy, *ubi jus, ibi remedium*, is applicable to the case.

Under our system of pleading, the complaint should contain a statement of the facts constituting the cause of action in ordinary and concise language, and the court may grant the plaintiff any relief consistent with the case made: Code Civ. Proc., secs. 426, 580. Here the complaint complies with the rule prescribed, and whether it be said to be based on the note or on an indebtedness resulting from the facts stated is, in our opinion, immaterial. In either view it states facts sufficient to constitute a cause of action, and the demurrer was therefore improperly sustained.

We advise that the judgment be reversed, and the cause remanded, ⁴¹⁹ with directions to the court below to overrule the demurrer.

TEMPLE, C., and VANCLIEF, C., concurred.

For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

HARRISON, J., GAROUTTE, J., McFARLAND, J.

JUDGMENTS IN PERSONAM AND IN REM AGAINST NONRESIDENTS BY CONSTRUCTIVE SERVICE OF PROCESS is discussed in *Hardy v. Beatty*, 84 Tex. 562; 31 Am. St. Rep. 80, and note, where the cases are collected.

EDWARDS v. SAN JOSE PRINTING SOCIETY.

[99 CALIFORNIA, 481.]

PLEADING.—IF A LIBEL OR SLANDER IS EXPRESSED IN LANGUAGE HAVING A COVERT MEANING not apparent on its face, or in words and phrases not used otherwise than as slang or cant terms, it is necessary for the plaintiff to allege and prove the sense in which the words were used and understood by those to whom they were addressed.

LIBEL.—To ACCUSE ONE OF "HAVING CHARGE OF THE SACK" for an election about to be held is equivalent to charging him with having charge of a fund to be used for the purpose of corrupting voters, and is libelous.

LIBEL.—PLEADING.—A complaint in an action for libel alleging that the defendants published of plaintiff that he was to have "charge of the sack" at an approaching election need not contain any allegation of the signification of the word "sack" as so used. The court will take judicial notice that it meant, in the connection in which it was employed, a fund to be used for corrupting voters.

JUDICIAL NOTICE.—PLEADING.—COURTS WILL UNDERSTAND WORDS IN GENERAL USE in the same sense in which they are usually understood by masses of men, and no allegation or proof of such meaning is necessary.

LIBEL.—MITIGATION OF DAMAGES BY PROOF OF GOOD FAITH.—THE MERE BELIEF of an editor in the justice and truth of an attack made by him upon the private character of a citizen is not a defense to an action by him for libel, nor can such belief be considered in mitigation of damages unless it appears to have been based upon information derived from a reliable source. It must be shown that the charge was made after due investigation of the matter to which it related.

LIBEL.—BEFORE DEFENDANT CAN MITIGATE DAMAGES by proving that the statement published by him was received from other persons, he must give the source of his information, and show that his informants were possessed of such character and standing as would command a belief in the truth of their utterances.

NEWSPAPER LIBEL.—A NEWSPAPER PROPRIETOR IS LIABLE for what he publishes in the same manner as any other individual, and can defend an action for libel, or mitigate damages to be recovered therefor upon precisely the same ground as any other individual could defend an action for slander in uttering the same words upon the street.

LIBEL.—EVIDENCE OF ACTS OF PLAINTIFF PRIOR TO THE PUBLICATION OF THE LIBEL, of a similar nature to those of which he was accused in such publication, is not admissible without first proving, or offering to prove, that the defendant had knowledge of such acts prior to such publication.

LIBEL.—NOMINAL DAMAGES.—AN INSTRUCTION THAT THE JURY SHOULD GIVE NOMINAL DAMAGES ONLY, if the reputation of the plaintiff was, prior to the libelous publication, bad with respect to the matters of which he was accused, should be refused, because the verdict of a jury cannot be restricted to nominal damages unless they believe that such damages will compensate plaintiff for the wrong suffered by such publication, and that exemplary damages should not be given.

S. G. Tompkins and F. E. Spencer, for the appellants.

Richards and Welch, for the respondent.

423 DE HAVEN, J. The complaint in this action alleges that the defendants published in a certain newspaper, of and concerning the plaintiff, a false and malicious writing, in the words following:

“VENALITY.

“It is understood that the Electric Improvement Company will put a large sum of money into the fight to-day to corrupt voters. There are scores of voters in every 434 community that money can buy. . . . It is also reported that Edwards is to have charge of the sack.”

The plaintiff further alleges that on the day of the publication of this article there was held an election in the city of San Jose, for the election of certain officers of the city, and that there was an active contest between the several political parties for the success of their respective candidates, and that by the words “into the fight to-day,” in the said publication, the defendants meant to say, and were understood to mean “into the election contest to-day.”

The complaint contained the further allegation: “That by the sentence and expression in the above publication ‘that Edwards is to have charge of the sack,’ the said defendants, and each of them, intended to be understood, and were understood, to mean that the plaintiff herein was to expend and direct the expenditure of a large sum of money, of the said Electric Improvement Company of San Jose, to buy votes

and corrupt the voters of said city, in said city election." The answer of defendants contained among other matters a denial of this allegation of the complaint, and also alleged, by way of further defense to the cause of action stated in the complaint, that, prior to the publication of the alleged libel, there was a report, or rumor, current in the city of San Jose, "and the same came frequently to the ears of the defendants, that the Electric Improvement Company in plaintiff's complaint mentioned, was to place a large sum of money in said fight or election contest in the city of San Jose, for the purpose of corrupting voters, and that H. J. Edwards was to have charge of the sack, and that defendants in good faith believed the report to be true, for the reason, among others, that plaintiff's reputation for having charge of money for the purpose of manipulating politicians or corrupting voters was bad, and for the further reason that plaintiff had on various previous occasions control of large sums of money to be used for the purpose of manipulating politicians and corrupting voters in elections"; and then the answer proceeded to specify the dates when, and the different amounts in the hands of the plaintiff for such purposes upon the dates given. The defendants further alleged that the publication complained of was made by them in good faith and in ⁴²⁵ the interest of good government.

The case was tried by a jury, and the plaintiff recovered a judgment for the sum of seven hundred and fifty dollars and costs, and the defendants appeal. The plaintiff introduced no evidence to show the meaning of the sentence, "It is also reported that Edwards is to have charge of the sack," contained in the alleged libel, or that defendants thereby were understood to mean that plaintiff was to expend and direct the expenditure of money to buy votes and corrupt voters in the election mentioned in the complaint; and the defendants moved for a nonsuit upon this ground, which motion was denied; and the court in submitting the case to the jury instructed them that the article complained of was a libel *per se*, and that upon its face it imputed "to the plaintiff conduct or the possession of a character which would lead him to commit acts, and that he was about to commit acts, which, if true, would subject him to obloquy in the community." The defendants insist that this instruction was erroneous, and that their motion for a nonsuit should have been granted, and, in support of their position, contend that the word "sack," ac-

according to the ordinary definition given by lexicographers, does not import a corruption fund, and that, if it has any such peculiar meaning attached to it as a slang phrase, it was incumbent upon plaintiff, not only to so allege, but also to prove such meaning, and that the word was understood to have such meaning by persons reading the article complained of.

There can be no doubt that when a slander or libel is couched in language having a covert meaning not apparent upon its face, or in words or phrases not used otherwise than as slang, or cant, terms, it is necessary for a plaintiff not only to allege and prove the slanderous or libelous sense in which the words were used by the defendant, but also that they were understood in the same sense by those to whom they were addressed. The following cases may be cited to sustain this proposition: *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48; 91 Am. Dec. 672; 47 Cal. 207; *Andrews v. Woodmansee*, 15 Wend. 232.

But we are of the opinion that this case does not fall within the rule just stated. Courts cannot affect to be ignorant of the recent meaning which the word "sack" has acquired in the current newspaper literature of the day, when used in the connection ⁴²⁶ in which it appears in the publication complained of. As thus used it signifies a fund in hand to be used for purposes of corruption; and to say that a person has charge of such a fund to be used on a given occasion is, in effect, to say that such person is to disburse the fund for the purposes of corruption. This meaning was doubtless first given to the word by vile and corrupt persons, engaged in distributing and receiving such funds, and, when first used in that sense, might well have been regarded as a slang expression, of the meaning of which courts would not then have taken judicial notice, but it is now so frequently used to convey this particular meaning, that it can hardly be considered, when employed for that purpose, as simply the language of slang and understood by the vulgar. In the case of *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251, the plaintiff, a minister, brought an action for the recovery of damages for a libel couched in the following words: "Then there was that Iowa Beecher business of his which beat him out of a station at Grass Lake. But pshaw! These reformers are pretty much all alike." The trial court left it to the jury to determine whether this language involved a charge of adultery; and the court, in speaking of this said: "It was set forth in the deo-

laration as intended to charge adultery, and the justificatory notice did not except it. Moreover, inasmuch as courts have no right to be ignorant of the meaning of current phrases which everybody else understands, it can hardly be seriously urged that such a charge, coupled with an averment that it lost a minister his situation, and backed with a justification, should be assumed without some explanation to be capable of an innocent meaning. Defendant was bound to show a loss of position at Grass Lake upon some charge of immoral conduct affecting the plaintiff's clerical character in order to justify this charge."

Indeed, the law may now be considered as settled that courts will understand words in general use in the same sense in which they are usually understood by the masses of men, and that no allegation or proof of such meaning is necessary; and, under this rule, the plaintiff was not required to allege or prove the meaning of the word "sack," as used in the alleged libel, or how it was intended to be or was understood by persons reading ⁴⁸⁷ it, the word having a well-understood meaning in the connection in which it is there used.

The editor of the newspaper in which the alleged libel was published, and one of the defendants in the case, was a witness upon the trial, and testified as follows: "These reports came to my ears from various parties whom I cannot mention. I know that many people said to me that Mr. Edwards was a political manipulator and that he would use money as he had done heretofore. It was from a knowledge of these facts that I have hinted at that told me—rumors that reached me from various parties that led me to the proposition—but you will notice that I did not charge Mr. Edwards with the use of money, but only stated that it was expected, reported, that he was to have charge of the sack. The whole libel lies right in that, and I used the license and liberty which I had as editor of the paper to announce it. . . . As to the names of the parties who reported these rumors, I presume there were dozens of them; I do not know. . . . I used my editorial prerogative to announce that fact, and I did it for the purpose of warning the company against anything of that kind . . . I did it for a good purpose, and to prevent the very thing which it was feared would occur." This testimony was, on motion of plaintiff, stricken out, and the ruling of the court upon the motion is assigned as error by the defendants. It is claimed by them that this evidence was admissible in

mitigation of damages, and that it tended to show good faith and want of malice in the publication. We think, however, that the evidence was properly excluded. The mere belief of the editor of a newspaper in the justice and truth of an attack which he makes upon the private character of a citizen is no defense to an action brought by the person assailed for the damages sustained by such attack; nor can such belief be considered in mitigation of damages, unless it is shown to have been based upon information derived from a reliable source. It must be shown that the charge was only made after due investigation of the matter to which it relates. In the case of *Bronson v. Bruce*, 59 Mich. 475, 60 Am. Rep. 307, it is said: "If the charges were false and made in an honest belief of their truth, after reasonable and proper investigation, such fact would go to mitigate damages, under certain circumstances . . . the ⁴³⁸ jurors would be warranted in reducing the damages to a minimum."

And in *Wilson v. Fitch*, 41 Cal. 382, this court said: "Nor can a defamatory publication in a public journal be said to be privileged simply because it relates to a subject of public interest and was published in good faith, without malice, and from laudable motives. No adjudicated case that I am aware of has ever gone so far. But whilst such publications cannot be deemed privileged, so as to require proof of express malice, the publisher, in order to rebut the presumption of malice, should be allowed the fullest opportunity to show the circumstances under which the publication was made, the sources of his information, and the motives which induced the publication. The public interest and a due regard to the freedom of the press demands that its conductors should not be mulcted in punitive damages for publications on subjects of public interest, made from laudable motives, after due inquiry as to the truth of the facts stated, and in the honest belief that they were true." The testimony stricken out did not tend to bring the defendants within the protection of this rule, which permits the mitigation of damages when a publication reflecting upon the character of another has been made in good faith. It only tended to show that others, whose names the witness did not give, believed or suspected that the plaintiff would be guilty of using money to influence the election then pending. The witness did not state that any reliable person professing to have any knowledge of the fact gave him any information to the effect that plaintiff was

to corruptly disburse money for the purpose of bribing voters in the election then to occur. If he received any such information it was also important to state the name of the informant, that the jury might judge whether his character was such that the defendant might reasonably have placed reliance upon his statements. The last sentence of the publication, "It is reported that Edwards is to have charge of the sack," imports something else than that there was an idle rumor to that effect, not entitled to credit or consideration. It is equivalent to the assertion that there was a well-founded report to that effect, and one which the publishers, after due inquiry and investigation, believed to be true, and in effect was the same as a direct charge ⁴³⁹ of the fact, and to enable defendants to mitigate the damages resulting from such a statement it was incumbent upon them to give the sources of their information, and to show that their informants were possessed of such character and standing as would command a belief in the truth of their utterances.

The liberty of the press is not more under the protection of the constitution than the liberty of speech, and the publisher of a newspaper can only defend an action for libel or mitigate the damages to be recovered therefor upon precisely the same grounds as any other individual could defend an action for slander in uttering the same words upon the street. "The liberty of the press, as the law now stands, is only a more extensive and improved use of the liberty of speech which prevailed before printing became general; and, independently of certain statutory provisions, the law recognizes no distinction in principle between a publication by the proprietor of a newspaper and a publication by any other person. A newspaper proprietor is not privileged as such in the dissemination of the news, but is liable for what he publishes in the same manner as any other individual": *McAllister v. Detroit Free Press Co.*, 76 Mich. 338; 15 Am. St. Rep. 318.

The court did not err in excluding the testimony of the witnesses, Willey and Savage, which was offered for the purpose of proving particular acts of plaintiff in relation to the use of money in elections, prior to the publication of the libel set out in the complaint. Assuming that evidence of such acts was otherwise competent, it would not be admissible without showing, or offering to show, that the defendants had knowledge of such acts when they made the publication complained of, and there was no offer upon the part of the defend-

ants to show such knowledge: *Hatfield v. Lasher*, 81 N. Y. 246; *Morse v. Morning Journal Assn.*, 123 N. Y. 207; 20 Am. St. Rep. 730; *Lothrop v. Adams*, 133 Mass. 471; 43 Am. Rep. 528; *Willover v. Hill*, 72 N. Y. 36.

The defendants introduced evidence tending to show that the plaintiff's reputation was that of a person having money under his control for the purpose of corrupting voters, and the plaintiff offered evidence tending to show the contrary. Upon this state of the evidence, the defendants requested the court to give ⁴⁴⁰ the following instruction, which was refused. "In fixing the amount of damages it is proper that you take into consideration the reputation of the plaintiff at and prior to the time of the alleged publication, as to the point wherein he claims to be damaged, and in case you find that plaintiff, prior to the publication, bore a bad reputation as to the point wherein he claims to be damaged, you may fix nominal damages only." The court did not err in refusing to thus instruct the jury. The defendants were entitled to an instruction, if they had requested it, that, in fixing the amount of damages, the jury might consider the previous character of the plaintiff as they might believe it to be from the evidence. But the jury, even if they found the character of the plaintiff to be bad, could not be restricted to nominal damages in their verdict, unless they believed that such damages would fully compensate the plaintiff for the wrong suffered by the publication of the matter alleged in the complaint, and that exemplary damages should not be given.

Judgment and order affirmed.

FITZGERALD, J., and MCFARLAND, J., concurred.

LIBEL—WORDS CONVEYING COVERT MEANING—PLEADING.—Where an alleged libel contains anything that is obscure, or needs explanation to give it the force of libel, the pleader should point it out by innuendo or prefatory averment: *Rice v. Simmons*, 2 HART. 417; 31 Am. Dec. 766; *Glatz v. Thies*, 47 Minn. 278; *Bradstreet Co. v. Hill*, 72 Tex. 115; 13 Am. St. Rep. 768, and note; *Maynard v. Fireman's etc. Ins. Co.*, 34 Cal. 48; 91 Am. Dec. 672; *Knapp v. Fuller*, 55 Vt. 311; 45 Am. Rep. 618; *Collins v. Dispatch Pub. Co.*, 152 Pa. St. 187; 34 Am. St. Rep. 636, and note. But if the common understanding of mankind takes hold of the published words and at once, without difficulty or doubt, applies a libelous meaning to them, an innuendo is not needed: *Hayes v. Press Co.*, 127 Pa. St. 642; 14 Am. St. Rep. 874, and note; *Bourriveau v. Detroit Evening Journal Co.*, 63 Mich. 425; 6 Am. St. Rep. 320, and note; *Adams v. Lawson*, 17 Gratt. 250; 94 Am. Dec. 455, and note.

LIBEL—GOOD FAITH AS A DEFENSE OR IN MITIGATION OF DAMAGES.—It is no legal excuse that defamatory matter was published inadvertently,

or with good motives, and in the honest belief of its truth: *Moore v. Francis*, 121 N. Y. 199; 18 Am. St. Rep. 810; *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102, and note; but it may be pleaded in mitigation of damages: *Democrat Pub. Co. v. Jones*, 83 Tex. 302; *Fountain v. West*, 23 Iowa, 9; 92 Am. Dec. 405, and note.

LIBEL—LIABILITY OF PUBLIC PRESS.—A newspaper publisher is liable for what he publishes, in the same manner as any other individual: *Park v. Detroit Free Press Co.*, 72 Mich. 560; 16 Am. St. Rep. 544. See, also, for a thorough discussion of newspaper libel, the extended notes to the following cases: *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333-369, and *Aldrich v. Press Printing Co.*, 86 Am. Dec. 89-93.

EVIDENCE—JUDICIAL NOTICE.—MEANING OF WORDS: See the extended note to *Lanfair v. Meettier*, 89 Am. Dec. 691. Courts will take judicial notice of the fluctuations and mutations of language: *Vanada v. Hopkins*, 1 J. J. Marsh, 285; 19 Am. Dec. 92. Words are to be understood in their plain and ordinary import in actions of libel: *Adams v. Lawson*, 17 Gratt. 250; 94 Am. Dec. 455.

IN RE SHORTRIDGE.

[90 CALIFORNIA, 526.]

JUDICIAL PROCEEDINGS, PUBLICATION OF.—A statute declaring that in an action for divorce the court may direct the trial to be private, and may exclude all persons other than the parties, their witnesses, and the officers of the court, and may during the examination of one witness exclude all others, does not authorize the court to make an order that no public report or publication of any character of the testimony in the case be made, and a person not a party to the action nor a witness therein cannot be punished for contempt of court for his violation of such order by publishing such testimony.

JUDICIAL PROCEEDINGS, RIGHT TO PUBLISH.—The public have a right to know and discuss all judicial proceedings, unless such right is expressly interdicted by statutory or constitutional provisions, or unless the publication prohibited by the order of the court is of such nature as to obstruct or embarrass the court in its administration of the law and the execution of the powers expressly conferred upon it.

CONTEMPT OF COURT—CONSTITUTIONAL LAW.—COURTS HAVE THE INHERENT POWER, in the absence of constitutional limitation upon their powers, to punish as a contempt any act, whether committed in or out of their presence, which tends to impair, embarrass, or obstruct them in the discharge of their duties, and the legislature, while it may regulate the procedure and enlarge the power, cannot fetter it.

CONTEMPT OF COURT—PUBLICATION OF JUDICIAL PROCEEDINGS.—The publication in a newspaper of a report of the testimony taken at a trial before the court sitting without a jury, containing no reflection upon the judge, and nothing to intimidate any witness or other person connected with the trial, cannot constitute a contempt of court, though the court has forbidden such publication. If the publication could not have interfered with the full and fair investigation of the merits of the case no contempt was committed by it, though the evidence so published

was of a filthy character, such as a due regard for decency and public morals would have left unpublished.

CONTEMPT OF COURT.—THE FINDING OF A COURT THAT CONTEMPT HAS BEEN COMMITTED IS NOT CONCLUSIVE in a proceeding by a writ of review if it further appears from all the facts disclosed that the acts charged and found could, in no circumstances, constitute contempt of court.

John E. Richards, S. M. Shortridge, and D. M. Delmas, for the petitioner.

F. E. Spencer, D. W. Burchard, and Nicholas Bowden, for the respondent.

⁵²⁸ **PATERSON, J.** When the case of *Price v. Price*, an action for divorce, was called for trial in the superior court of Santa Clara county, the court was advised that the evidence would probably be of a filthy nature, and thereupon made an order directing "that during the trial all persons be excluded from the courtroom except the officers of the court, the parties, and their counsel." It was further ordered "that no public report or publication of any character of the testimony in the case be made." On the following day the petitioner herein caused to be published in the *San José Mercury*, a newspaper of which he was the editor and publisher, an article referring to the order of the court, and containing what purported to be the testimony of the witnesses. Upon an affidavit setting forth the facts stated, the court made an order commanding Shortridge to appear and show cause why he should not be adjudged guilty of contempt. Mr. Shortridge in his answer and at the hearing disclaimed any intention to reflect upon the court, or show any disrespect therefor, and claimed that in publishing a fair and true report of the testimony and proceedings he was simply exercising a constitutional right, with which the court could not interfere by order or otherwise. Thereafter, an opinion was filed showing that the learned judges of the court, sensible of the delicate position they occupied in determining the scope of ⁵²⁹ their own judicial powers, had given the subject most careful consideration, and holding it to be their duty in support of the honor of the state and the dignity of the court to punish the respondent for violating the order. A judgment was entered adjudging Shortridge guilty of contempt of court, and ordering him to pay a fine of one hundred dollars. Thereupon the petitioner herein applied for a writ of *certiorari*, which was granted, and the matter having been heard and submitted, we are now called upon to determine whether the court exceeded its juris-

diction in adjudging the petitioner guilty of contempt on the facts stated.

In support of the order under consideration counsel for respondents rely upon two propositions, namely: 1. That the order was authorized by sections 125 and 1209, subdivisions 5 and 9 of the Code of Civil Procedure; and 2. That the publication was an interference with judicial proceedings which the court had the inherent power to punish as a contempt.

1. The sections referred to read as follows:

"SEC. 125. In an action for divorce, criminal conversation, seduction, or breach of promise of marriage, the court may direct the trial of any issue of fact joined therein to be private, and may exclude all persons except the officers of the court, the parties, their witnesses, and counsel; provided that in any cause the court may, in the exercise of a sound discretion during the examination of a witness, exclude any or all other witnesses in the cause."

"SEC. 1209. The following acts or omissions, in respect to a court of justice or proceedings therein, are contempts of the authority of the court: . . .

"5. Disobedience of any lawful judgment, order, or process of the court.

"9. Any other unlawful interference with the process or proceedings of a court."

It may be well to note that petitioner was not a party, a witness, or an officer of the court; and that no order was made excluding the witnesses from the courtroom. The question, therefore, whether a witness, party, officer, or other person over whom the court has acquired jurisdiction, may be punished for disclosing testimony when the trial is had with closed doors, ⁵³⁰ and the question whether it is a contempt for a newspaper to publish the evidence after an order has been made excluding the witnesses from the courtroom during the trial, must be eliminated from the consideration of the case. The court planted its conclusion squarely upon the ground that "the evident purpose of the act was that in cases of divorce . . . the entire evidence should not be produced before the public," saying. "Of course the main purpose of this enactment was to promote public morals. . . . How the public morals can be promoted by detailing to the world the testimony in low and filthy divorce cases, or blazoning forth the injuries that some poor unfortunate girl may have suffered, or by heralding the connection of good and re-

respectable and moral people where they are unfortunately and unwillingly as witnesses, is something that the court cannot understand, and which the legislature unquestionably intended to prohibit. . . . It is the disposition of every man to protect his fireside. It is his disposition to raise his children up in the moral way. It is his desire to keep all contaminating influences from them, and I think the legislature has wisely and properly placed in these particular actions the power in the court to do so, and that the court would be recalcitrant to its duty if it did not undertake to discharge the duty cast upon it."

Every one who has the welfare of society at heart will doubtless agree with the learned judges of the court below in their opinion as to the policy of a law which would prevent the publication of such matters as they complained of; but the construction placed upon the provisions of the act quoted above is not, we think, authorized by the language of the section. In this country it is a first principle that the people have the right to know what is done in their courts. The old theory of government which invested royalty with an assumed perfection, precluding the possibility of wrong and denying the right to discuss its conduct of public affairs, is opposed to the genius of our institutions in which the sovereign will of the people is the paramount idea; and the greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in the discussion of the proceedings of public tribunals that is consistent with truth and decency are regarded as essential to the ⁵³¹ public welfare. Therefore, when it claimed that this right has in any manner been abridged, such claim must find its support, if any there be, in some limitation expressly imposed by the law-making power, or the right to exercise the authority claimed must be necessarily implied as essential to the execution of the powers expressly conferred.

We find no expression in the section referred to upon which such a claim can be based. If the legislature had intended to prohibit the publication of proceedings in cases tried with closed doors it would have been easy to declare its will in that regard in express terms. It has not done so, and the right claimed is not essential to the execution of the authority conferred by the section. The assumption that the object of the statute was to protect the public from the contaminating influence of prurient revelations often made in actions of divorce,

seduction, and criminal conversation is unwarranted. The object of the act is palpable. It was to secure decorum in the conduct of trials involving the relation of the sexes and to protect witnesses of refined sensibilities from the ordeal which they might otherwise have to pass through in giving testimony of a delicate or filthy nature in the presence of a crowd of vulgar or curious spectators. To give effect to the section no other intention on the part of the legislature is necessarily implied, and proceedings for contempt being criminal in their nature, no presumption should be indulged.

Section 1032 of the Political Code adds no strength to the position taken by counsel for respondent. What has been said of section 125 of the Code of Civil Procedure is applicable to section 1032, and may be summed up in the proposition that the public have the right to know and discuss all judicial proceedings, unless such right is expressly interdicted by constitutional or statutory provisions, or unless the publication prohibited by the order of the court is of such a nature as to obstruct or embarrass the court in its administration of the law and the execution of the powers expressly conferred upon it.

2. Counsel for petitioner contend with much emphasis that any act of the legislature or of the court attempting to deprive the people of the right to be informed of judicial proceedings, or to publish or discuss the same, is void. It is said that secrecy and silence in such matters are utterly repugnant to the ⁵²² spirit of our institutions, and opposed to the constitutional declaration of right with respect to free speech and the liberty of the press. Provisions of the codes are cited showing that the legislature has sought to abridge rather than to extend the common-law right of the courts to punish for contempt. Most of them relate purely to questions of libel, but one of them—a recent act of the legislature—provides that “no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of said court, unless made in the immediate presence of such court while in session, and in such manner as to actually interfere with its proceedings”: Stats. 1891, p. 7. But we know of no decision which supports the proposition contended for. No authority has been found which denies the inherent right of a court, in the absence of a limitation placed upon it by the power which created it, to punish as a contempt an act—whether committed in or out of its

presence—which tends to impede, embarrass or obstruct the court in the discharge of its duties. It is a doctrine which is admitted in all its rigor by American courts everywhere, and does not need the support of foreign authorities based upon the fiction that the majesty of the king, represented in the persons of the judges, is always present in the court. It is founded upon the principle—which is coeval with the existence of the courts, and as necessary as the right of self-protection—that it is a necessary incident to the execution of the powers conferred upon the court, and is necessary to maintain its dignity, if not its very existence. It exists independent of statute. The legislative department may regulate the procedure and enlarge the power, but it cannot without trenching upon the constitutional powers of the court and destroying the autonomy of that system of checks and balances, which is one of the chief features of our triple-department form of government, fetter the power itself. In Arkansas the legislature sanctioned the power of the court to punish as contempts certain enumerated acts, and no others. The court held that the sanction was merely declaratory of the common law, and that the prohibitory clause was entitled to respect as an opinion of a co-ordinate branch of the government, but was not binding upon the courts: *State v. Morrill*, 16 Ark. 384. This decision is in line with all the authorities.

§§ Although the power is necessarily an arbitrary one to a great extent, it has been exercised by the courts, in this country at least, only as an auxiliary means to attain the ends of justice. If abused by the judges at all, it has been only in the rarest instances. No one has realized more than the judges themselves the fact that a court cannot coerce the respect of the people for itself or its decisions, and the very delicacy of the power has proved to be a safeguard against its abuse. To this alone must be attributed the fact that, although the inherent power referred to has been claimed and exercised by the courts of this country since the organization of the government, the framers of the constitution in all the states of the union, except Georgia and Louisiana, have deemed it unnecessary to place any limitation upon the power of their courts to punish for contempts: *Stimson's American Statute Law*, sec. 582.

Did the article in question tend to embarrass, impede, or obstruct the administration of justice? If it did, the petitioner is guilty of contempt, regardless of the order. In de-

termining the question whether the conduct of the petitioner was an unlawful interference with the proceedings of the court the order itself is a false quantity. As said by his counsel at the argument: "If the law, under the circumstances, prohibited the publication, the order of the court was superfluous; and the petitioner is censurable, regardless of that order, for the all-sufficient reason that he has violated the law. If, on the other hand, the law did not prohibit the publication, the petitioner had the right, under the law, to make it, and that right could not be abridged or taken away by an order."

The constitution of every state in the union guarantees to every citizen the right to freely speak, write, and publish his sentiments on all subjects, and prohibits the passage of any law "to restrain or abridge the liberty of speech or of the press." What one may lawfully speak he may lawfully write and publish. The rights thus preserved by the constitution are dear to the hearts of every American, and their exercise can be complained of by the courts in a summary proceeding only when the publication or the speech interferes with the proper performance of judicial duty. If there has been no such interference, there has been no contempt. In the article complained ⁵²⁴ of we find nothing which could have interfered with a full and fair investigation of the merits of the case then on trial. The case was before the court without a jury. It is not claimed that the petitioner, in his report mutilated the testimony, misrepresented or reflected upon the judge, attempted to intimidate or swerve any witness, or to dictate to any one connected with the trial what his action should be in regard to any matter. How, then, could such an article interrupt the orderly conduct of a trial, or tend to induce a failure of justice? With the moral aspect of the case we have nothing to do. The courts are not conservators of public morals. Rules affecting the conduct and morals of the community must proceed from the legislative department. It is argued with some plausibility that the publication of the testimony might deter timid and highly sensitive witnesses from making disclosures which they would make if assured that their utterances would not be given publicity. But this is an argument which would apply to all cases, and rests upon the erroneous assumption that a witness will violate his oath to tell the truth, and the whole truth, to save himself from the mortification incident to the relation and publicity of cer-

tain disagreeable facts within his knowledge. There is no real danger of such a result. The testimony which a witness gives in a court of justice is not the discussion of a topic voluntarily selected by him, and for which he may choose his language, and use chaste or unchaste words, regardless of the truth of the facts he is required to detail; and every witness is supposed to appreciate this fact, and to speak the truth without regard to the question who or how many will be informed of the proceedings. We are aware of the fact that there are English precedents for holding that the courts possess and exercise the power to prohibit in all cases the publication of their proceedings; but we know of no decision in this country upholding the right of a court to make such prohibition, except where the publication tended to interfere with the proceedings before the court. Blackstone lays it down as the law of England in his day that it was unlawful and a contempt of court "to print false accounts (or even true ones without proper permission) of causes then dependent in judgment": 4 Blackstone's Commentaries, 285. Several English cases are cited which seem to hold this ^{same} doctrine to the extent stated. But precedents promulgated at a time when the ministers of the crown claimed and exercised the right to seize a newspaper and stifle the voice of its editor, when books were destroyed and speeches suppressed to subserve political purposes, are of little value in this age, and especially in this country.

It was to forever stamp out such a claim and prevent such occurrences that the framers of our constitutions incorporated therein the guarantee of liberty of speech and of the press. This constitutional liberty, as Judge Cooley says, "implies the right to freely utter and publish whatever the citizen may please, and be protected against any responsibility for so doing, except so far as such publications from their blasphemy, obscenity, or scandalous character may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals, . . . implies not only liberty to publish, but complete immunity from legal censure and punishment for the publication so long as it is not harmful in its character when tested by such standards as the law affords": Cooley's Constitutional Limitations, p. 421. Liberty of the press must not be confounded with mere license. Liberty of the press stops where a further exercise would invade the rights of

others. This provision of the constitution does not authorize a usurpation of the functions of the courts. Under the plea of the liberty of the press a newspaper has no right to assail litigants during the progress of a trial, intimidate witnesses, dictate verdicts or judgments, or spread before juries its opinion of the merits of cases which are on trial. As stated before, what may be spoken may be written, and the converse of the proposition is true that what may not be spoken under such circumstances may not be written.

As the article in question does not go beyond these limitations, and as the section under which the court below proceeded to judgment clearly does not authorize the order which was made, the proceedings must be annulled.

Counsel for respondent claim that the finding of the court that the publication was an unlawful interference with the proceedings of the court, and, therefore, a contempt must be taken as conclusive. But, where it appears from all the facts found that the publication could not, under any circumstances, constitute ⁵³⁶ a contempt, a judgment thereon imposing a fine or imprisonment is a nullity.

It is ordered that the proceedings of the court under review be and they are hereby annulled, and the clerk of this court is directed to transmit a copy of the judgment to the clerk of the court below.

DE HAVEN, J., FITZGERALD, J., HARRISON, J., and McFARLAND, J., concurred.

CONTEMPT—PUBLICATION OF JUDICIAL PROCEEDINGS: See the extended note to *State v. Galloway*, 98 Am. Dec. 419.

CONTEMPT—INHERENT POWER OF COURTS TO PUNISH FOR.—This question will be found thoroughly discussed in the notes to the following cases: *Ex parte Robertson*, 11 Am. St. Rep. 213; *Burns v. Allen*, 2 Am. St. Rep. 847; *State v. Galloway*, 98 Am. Dec. 414, and *Clark v. People*, 12 Am. Dec. 178.

CONTEMPT—WHETHER PROCEEDINGS ARE REVIEWABLE.—This question is thoroughly discussed in the monographic note to *Mullen v. People*, 22 Am. St. Rep. 417-426.

HUNT v. WARD.

[39 CALIFORNIA, 512.]

CORPORATIONS—ACTIONS AGAINST STOCKHOLDERS—STATUTES OF LIMITATIONS APPLICABLE TO.—If a statute declares that actions against stockholders to enforce a liability created by law may be brought within three years after the liability was created, the time within which an action may be maintained cannot be prolonged by the giving of a note by the corporation, or otherwise. Computation of time within which the action may be brought must commence with the creation of the original indebtedness.

CORPORATIONS—STATUTE OF LIMITATIONS AS TO ACTIONS AGAINST STOCKHOLDERS—CONSTITUTIONAL LAW.—Though the constitution declares that each stockholder of a corporation shall be personally liable for a portion of all its debts and liabilities contracted or incurred while he is a stockholder, the legislature may prescribe a time within which actions to enforce such liability must be commenced.

Lee and Scott, for the appellant.

Wells, Monros, and Lee, for the respondent.

613 **McFARLAND, J.** Action to recover of defendant Ward his proportionate share of the alleged indebtedness of a corporation in which he was a stockholder. Judgment went for plaintiff, from which, and from an order denying a new trial, said defendant appeals. Appellant contends, among other things, that the complaint does not state facts sufficient to constitute a cause of action, and that the action is barred by section 259 of the Code of Civil Procedure.

It is averred in the complaint that on February 20, 1888, a certain corporation called the "Exchange Block Company" made and delivered to respondent its promissory note for seven thousand five hundred dollars, payable one year after date with twelve per cent per annum interest, and also executed to respondent a mortgage on certain corporate property to secure said note; that afterwards respondent foreclosed said mortgage, and that after the sale of the mortgaged premises there was a deficiency of three thousand two hundred and ninety-one dollars and fifty cents, for which judgment was docketed against said corporation on January 9, 1891, and that the same is wholly unsatisfied; and that during the times mentioned appellant owned such a number of shares of the corporate stock as would make his proportionate share of said deficiency judgment eight hundred and twenty-seven dollars and fifty cents, for which last-mentioned sum judgment is prayed in this present action against appellant.

It will be observed that there is no averment of the time of the incurring of the indebtedness or liability for which the note was given, or of the nature of such indebtedness—the facts upon which it was founded; the only averment on the subject being the making and execution of the note and mortgage. The complaint bases the right to recover on the making of the note and the judgment against the corporation; but, as the liability of a stockholder is a separate and independent one, commencing with and dependent upon the original indebtedness, it is doubtful if the averments of the complaint in the case at bar are sufficient. Indeed, such averments were directly held by this court in *Tilden v. Gashwiler*, No. 4053, decided in 1875, to be insufficient. In that case the complaint did aver that the corporation was indebted to plaintiff's assignor in a stated sum of money, and that in consideration of such indebtedness it made its promissory note, upon which it was sought to hold the stockholder; but the trial court sustained a general demurrer upon the ground that the liability ^{§14} of the stockholder was upon the original indebtedness, and not upon the note, and that there was no averment of facts showing such indebtedness. The plaintiff appealed, and the appellate court, after a most elaborate argument, as shown by the briefs in the record, affirmed the judgment; but as that case was not reported and there was no written opinion delivered in it—it being simply noticed in 50 Cal. 668, under the head of "Cases Not Reported"—it cannot be taken as known generally to the bar, and, therefore, should not have much, if any, weight as authority. We allude to it merely to show how the court viewed the question at that time, and to illustrate the possible danger of relying upon such averments as those contained in the complaint in the case at bar. And, as we think that appellant's plea of the statute of limitations is a perfect defense to this action, we prefer not to say more upon the question above suggested, leaving its final decision to some case in which it must necessarily be determined.

As the note of the corporation is alleged to have been made on February 20, 1888, the liability of the stockholder was created, under any view, at least as early as the date of the note; and this present action was not commenced within three years after that date. The statutes of limitation of this state are contained in title 2, part 2, of the Code of Civil Procedure, from section 312 to 363; and the general rule, as ex-

pressed in said title, is that actions can be commenced within the prescribed periods after the cause of action shall have accrued. But section 359 provides that "this title does not affect actions against . . . stockholders of a corporation . . . to enforce a liability created by law; but such actions must be brought within three years after . . . the liability was created." And it was definitely settled in the cases of *Green v. Beckman*, 59 Cal. 545, and *Moore v. Boyd*, 74 Cal. 167, that a stockholder's liability is a "liability created by law" within the meaning of said section 359.

We do not see how this plain, clear language of section 359 can be explained away by any rule or any number of rules of construction. There is no room for the play of interpretation when the language under review leaves no doubt as to the meaning of those who used it. The legislature having, in former ⁶¹⁵ sections of said title 2, declared the general rule, that actions should be commenced within the prescribed periods after the accruing of the cause of action, by section 359 deliberately provided that such rule should not apply to an action against a stockholder to enforce his liability for his proportionate share of the corporate debts, but that such action should be brought within three years after the liability was created.

Of course, there is a clear and wide distinction between the creation of a liability and the accruing of a cause of action thereon; and section 359, *ex industria*, emphasizes that distinction. A liability may be absolute or contingent; it may be unconditional or limited; it may be presently enforceable by action, or there may be time given for its performance; but, whatever its character, it is created by the consummation of the contract, act, or omission by which the liability is incurred. If the appellant before the maturity of the note had sold his stock to a third person, who held it when the note matured, the appellant, and not the third person, would have been liable as a stockholder—which illustrates, if illustration be needed of a thing so plain, the meaning of the words "after the liability was created" as used in said section 359.

It is sought to overcome the plain language of the code by supposing a case where the corporation had given a note not due until more than three years after date, and suggesting that in such a case the statute would have run against the stockholders before the accruing of any right of action against

them. But if we assume that in such a case, according to respondent's view, the stockholders could be sued only upon the note, still the situation—called by counsel “an anomalous condition of affairs”—would be the result of the voluntary act of the creditor done in the face of the law. Such a condition of affairs would not be the necessary outcome of the law; for the code gives the creditor ample room and time to subject stockholders to their independent liability for the indebtedness of the corporation. But if he chooses to make a contract with the corporation, by which its payment of the indebtedness is postponed beyond the three years' limitation in favor of the stockholders, he simply does an act which practically waives his right against the latter—assuming, of course, that his only cause of action ^{§16} against the stockholder is upon the note of the corporation. It must be remembered that the right to pursue the stockholder at all does not exist at common law, but is solely the creature of the written law; and that it must be exercised upon the conditions and within the limits which the written law prescribes. The invocation by respondent of the clause of the state constitution, declaring the liability of stockholders of corporations, does not strengthen his position; for the statement of a right in a constitution is always subject to reasonable statutory limitations of the time within which it may be enforced, unless otherwise declared in the constitution itself; and three years is certainly not an unreasonable period of limitation. We see, therefore, no reason for disregarding the plain language of section 859. We need not inquire into the policy of the section; but as certificates of stock of many corporations pass frequently from hand to hand, it may well be assumed that the legislature intended to protect temporary stockholders from the power of officers of corporations and their creditors, to indefinitely extend the enforcement of liabilities created while they happened to be holders of stock. If the policy be unwise or bad, it is for the legislature to change it.

No cases have been cited where the point here involved was before the court; the question is *res integra*. The case nearest in point is that of *Redington v. Cornwell*, 90 Cal. 63, where the corporation had given its promissory note in consideration of a mutual open account, and the court, in considering the application of the statute of limitation to stockholders, used this language: “The averment as to the mutual open account in the third amended complaint is of doubtful sufficiency to

extend the period of limitation even against the corporation. As to the stockholders, it can have no effect whatever even though sufficiently alleged. The corporation had no more power to extend the period of limitation as against the stockholders by a mutual open account than by making its promissory note. The liability of the stockholders is created and exists by statute. It arises when a debt is contracted by the corporation. It is limited to three years from the time it arises; and it is well settled in this state that the corporation has no power to extend that limitation without direct authority from the stockholders."

⁶¹⁷ As the foregoing views are determinative of the case in favor of appellant, it is not necessary to discuss the admissibility in evidence of the judgment against the corporation, or any of the other questions argued by counsel.

The judgment and order appealed from are reversed, and the cause remanded.

DE HAVEN, J., and FITZGERALD, J., concurred.

Hearing in Bank denied.

STATUTE OF LIMITATIONS IN ACTIONS TO ENFORCE STOCKHOLDER'S STATUTORY LIABILITY.—This question is fully treated in the extended note to *Thompson v. Rose San. Bank*, 3 Am. St. Rep. 806, and see also the same note at pages 827-829.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

HAWKINS v. STATE.

[32 FLORIDA, 243.]

JURY TRIAL.—EXTRANEOUS MATTER WRITTEN ON INSTRUCTION.—The word "guilty," written through inadvertence by the trial judge on the margin of an instruction given to the jury in a criminal case, and permitted to remain in their hands in that form during their deliberations, is presumed, on appeal, to have been read by and to have influenced them to the prejudice of the accused, and entitles him to a reversal unless it is shown beyond a reasonable doubt that no injury resulted therefrom.

J. W. Brady, for the appellants.

William B. Lamar, attorney-general, for the state.

243 **TAYLOR, J.** The plaintiffs in error were tried and convicted at the spring term, 1893, of the circuit court for Polk county, Samuel Hawkins for murder in the second degree, and Howard Hawkins as accessory of the same crime, and both were sentenced to the state prison for life. Upon the refusal of their motion for new trial they bring writ of error here. Various errors are assigned, but we deem it unnecessary to notice any of them except the 5th, which is that the court erred in writing the word "guilty" on the margin of one of the instructions given to the jury, and then permitting the charges thus written upon to be taken by the jury to their room. This error was also one of the grounds of the motion for new trial. It is conceded here that the writing of the word "guilty" by the judge below upon the margin of the instruction was done entirely through inadvertence, and that the word intended to be written was "given," as the instruction opposite to which the word "guilty" was written

was in fact given by the court to the jury at the request of the defendant's counsel. But however absent mindedly or unintentionally it was written upon the charge, the question for our consideration is, was it, in the hands of the jury in their room, calculated to injuriously affect the defendants? We think that it was. There are but two words—"guilty," "innocent"—that we know of in the English vocabulary that, when put singly and alone before the eyes of the jury, can so completely and effectually sum up and convey to their minds the conclusions of the judge upon the entire testimony in the case. Had he written the one word "innocent" on the charge, the ²⁵⁰ thought conveyed thereby would have been, these people are innocent; the proofs are insufficient to establish their guilt. On the other hand the writing of the word "guilty" was tantamount to saying the proofs are ample to establish their guilt; in my judgment they are guilty; either of which declarations would have been an unwarranted invasion by the court of the exclusive province of the jury to pass upon the facts. Though the jury may have been impressed with the idea that the writing of the word was unintentional on the judge's part, and due to absent mindedness, even then it was calculated to convey to their minds the idea that the judge inadvertently gave expression to that which was uppermost in his mind; all of which was seriously harmful to the defendants. The writing of this word by the court upon the margin of the charge, and then sent with the jury to their room, to say the least, was so wide a deviation from the ordinary proceedings and forms provided by law for the securement to the defendants of a fair and impartial trial that they were entitled to require, at the hands of the state, satisfactory evidence that they had not been injured by reason of such departure from the usual forms, and the burden was not upon them to show affirmatively that such departure had been the probable cause of their conviction. As it is expressed by Judge Parker in *State v. Prescott*, 7 N. H. 287: "The shield which the law has provided would fall far short of affording him the protection intended, if it might be thrown aside at pleasure, and he have no right to complain, unless he could prove that the want of it had been actually prejudicial to his case—a matter which it might, in many cases, be very difficult to prove, notwithstanding such was the fact. He has the right, therefore, to call upon the officers of the ²⁵¹ government in such case, before they de-

mand judgment, to show that the irregularity in the trial has not been the means of injustice in the verdict. As the law humanely presumes his innocence in the first instance until his guilt has been proved beyond a reasonable doubt, so it will presume that a departure from the mode prescribed by the law for his trial has been to his prejudice until the contrary is shown by the same degree of evidence": *Jumperts v. People*, 21 Ill. 375; *Sims v. State*, 43 Ala. 33. The fact being admitted that the charges, with this indorsement on the margin thereof, were in the hands of the jury during their deliberations, the presumption is that it was read by them in the absence of proof to the contrary: *Clark v. Whitaker*, 18 Conn. 548; 46 Am. Dec. 337; *Durfee v. Eveland*, 8 Barb. 46.

From these conclusions the judgment of the court below is reversed, and a new trial ordered.

TRIAL—INSTRUCTIONS—EXPRESSION OF OPINION BY JUDGE.—An instruction which suggests a conclusion from the facts without informing the jury that they are the exclusive judges of such facts is erroneous: *Horne v. State*, 1 Kan. 42; 81 Am. Dec. 499, and note; *State v. Dick*, 2 Winst. 45; 86 Am. Dec. 439, and note; *People v. King*, 27 Cal. 507; 87 Am. Dec. 95, and note.

TERRELL v. WEYMOUTH.

[32 FLORIDA, 255.]

PARTITION—ADMINISTRATORS have no authority to institute or maintain proceedings for the partition of land in which their intestates were interested.

PARTITION—WHEN VOID AT TO MINORS.—Proceedings to partition land in which minors are interested are void as to them unless they are made parties thereto and personally served with process.

EQUITABLE ESTOPPEL AS TO TITLE TO LAND is such conduct as prevents a party from setting up his legal title, because he has, through his acts, words, or silence, led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience.

EQUITABLE ESTOPPEL DEPENDS UPON THE FACTS AND CIRCUMSTANCES of each particular case.

EQUITABLE ESTOPPEL TO ATTACK PARTITION SALE.—One of three minors, two brothers and a sister, having an equal undivided interest in land, sold under void partition proceedings, and purchased by their guardian for the other two, who receives his full share of the proceeds of such sale upon coming of age, and thereafter and after the death of his brother leaving himself and his sister sole heirs of such deceased brother's share, and with knowledge that his sister has conveyed her three-fourth's interest in the land, conveys the remaining one-fourth

interest to her grantees, asserting that such interest is derived by descent from his deceased brother, and is all the interest he has or can claim in the land, is estopped after the lapse of seven years from assailing the validity of the partition sale.

J. M. Cheney and Arthur F. Odlin, for the appellant.

C. F. Akers and George R. Newell, for the appellee.

²⁵⁶ TAYLOR, J. The appellant, on the 29th of February, 1888, sued the appellee in ejectment, in the circuit court of Orange ²⁵⁷ county, for the recovery of the possession of an undivided one-twelfth interest and estate in and to the southwest $\frac{1}{4}$ of the northwest $\frac{1}{4}$ of section 36 of township 22 south, range 29 east, containing 40 acres. The parties by agreement waived a jury and submitted the cause to the judge of the court below for adjudication upon both the law and facts. The trial resulted in a judgment in the defendant's favor, and the plaintiff appeals here.

From an agreed statement of facts it appears that Lucinda Terrell, the mother of the plaintiff, died in August, 1860, owning, in her own separate right, the whole of the northwest $\frac{1}{4}$ of said section 36, of which the land in controversy is a part. That she left four heirs at law, viz: her husband, George W. Terrell, Mary Hughey and Barnard Hughey, two children by a former marriage, and Franklin Terrell (the plaintiff) her child by her last husband. That the husband, George W. Terrell, conveyed his undivided one-fourth interest in said land to one Henry Robinson. That Robinson afterwards died, and Catherine F. Reaves became his administratrix. That the said Catherine F. Reaves, as administratrix of Robinson, on October 16, 1873, filed a petition in the circuit court of Orange county for the partition of said land against William J. Brack, as guardian *ad litem* for the minors, Mary Hughey, Barnard Hughey, and Franklin L. Terrell. That a decree for the sale of said land for partition was rendered in said suit, and three commissioners were appointed to make the sale thereof; and that said commissioners sold the same for partition on September 4, 1874; James P. Hughey, as guardian, for the two minor heirs, Mary Hughey and Barnard Hughey, becoming the purchaser of one hundred and twenty-three ²⁵⁸ acres that included the lands sued for herein, and taking a deed to himself, for their benefit, as guardian. That the plaintiff, Franklin Terrell, arrived at the age of twenty-one years on the twenty-third day of June, 1881, and then

had a final settlement with his guardian, in which he received from his guardian the amount of his full *pro rata* share of the money arising from the sale of said land under said partition proceedings, but did not know at the time that the money came from the sale under said partition proceedings. That a short time before bringing this suit he paid the amount so received into the registry of the court below, with interest from the date of said partition sale as a tender or refunding. That the plaintiff would be twenty-eight years of age on June 28, 1888. That in 1877 Barnard Hughey, one of the wards for whom James P. Hughey, as guardian, purchased said land, died a minor, unmarried, and without having conveyed his interest in said land, and leaving as his sole heirs at law his sister of the full blood, Mary E. McCall (*née* Mary E. Hughey), and the plaintiff, Franklin L. Terrell, who was his half-brother. That on the twenty-third day of June, 1881, upon coming of age, the plaintiff conveyed by warranty deed to one John G. Sinclair, from whom the defendant derives his title, an undivided one-fourth interest in and to the forty acres of land out of which the undivided one-twelfth interest is sought to be recovered herein, for the consideration of two hundred dollars; and that Mary E. McCall (*née* Hughey), the plaintiff's half-sister, and her husband conveyed to the said John G. Sinclair by deed the other three-fourths interest in said forty acres. That the defendant, and those under whom he claims, have been in the quiet and adverse possession of said land under claim of title since the partition sale to James P. Hughey, as guardian, on ²⁵ September 4, 1874, and that the defendant is a purchaser for value. The plaintiff admitting that there is a regular chain of title from the said James P. Hughey, guardian, down to and in the defendant. By the agreement both parties were to have the privilege of introducing other evidence outside of the above facts agreed upon.

The plaintiff introduced in evidence the original record of the proceedings in the partition suit instituted by Catherine F. Reaves, as administratrix of the estate of Henry Robinson, deceased, against W. J. Brack, as guardian *ad litem* for the three minor heirs of Lucinda Terrell, deceased, including the petition, various orders appointing commissioners in partition, the report of the commissioners of their inability to divide the land in severalty without detriment to the interests of the parties entitled, the decree of the court ordering the sale for partition, the report of the sale and decree confirming the

same. The plaintiff's object in introducing this record was to show that said petition sale was void because the minor heirs of Lucinda Terrell, including himself, were not properly made parties thereto, and because the petitioner, Catherine F. Reaves, in her capacity as administratrix of the estate of Henry Robinson, deceased, could not alone maintain proceedings for the partition of lands in which her intestate was interested.

If this partition sale was valid, then, by the purchase thereof, the two minors, Mary E. Hughey and Barnard Hughey, the half-sister and half-brother of the plaintiff, became vested with the title to the entire tract of land left by their mother, each of them acquiring a one-half interest therein; and upon the death of Barnard while still a minor and without issue, his thus acquired one-half interest descended to his sister, Mary E., ²⁶⁰ and to his half-brother, the plaintiff, Franklin L. Terrell, in the proportion of two-thirds of such half-interest to his sister of the full blood, Mary E., and the other one-third thereof to his half-brother, the plaintiff, which would have vested in the plaintiff, by descent from his half-brother, a one-sixth interest in the entire tract. But if such sale was a nullity, and void as to all of said three minors, then each of them owned a one-fourth interest only by descent from their mother, Lucinda Terrell; and upon the death of Barney Hughey, as aforesaid, his one-fourth interest descended in the proportion of two-thirds thereof to his sister of the full blood, Mary E., and the other one-third thereof to his half-brother, the plaintiff, entitling Mary E. to her own one-fourth, plus two-twelfths inherited from Barnard, equaling eight-twelfths of the whole; and entitling the plaintiff to his own one-fourth, plus one-twelfth, inherited from his half-brother, Barnard, equaling four-twelfths of the whole. The plaintiff does not dispute the sale and conveyance by him to John G. Sinclair of a one-fourth interest in the forty acres in controversy, but seeks by this suit to annul the partition sale, and thereby to make it appear that he only sold and conveyed to John G. Sinclair his one-fourth interest in the forty acres in dispute that he inherited directly from his mother, and that he still owns and retains the one-twelfth interest therein, that he is now contending for, that he inherited from his half-brother, Barnard Hughey.

That the partition proceedings and sale were void we have no doubt: 1. Because Catherine F. Reaves, in her capacity as

administratrix of Henry Robinson, deceased, had no authority to institute or maintain ²⁶¹ such proceedings: *Whitlock v. Willard*, 18 Fla. 156; *Greeley v. Hendricks*, 23 Fla. 366; and 2. Because the three minors interested were not made parties thereto by having process served upon them personally: *McDermott v. Thompson*, 29 Fla. 299; *Thompson v. McDermott*, 19 Fla. 852.

But the appellee contends that the appellant is estopped by his conduct, actions and declarations since said partition sale and since arriving at full age, from now assailing or questioning its validity; and that his conduct, acts, and declarations since his arrival at the age of his majority amount to such an acquiescence in and ratification of such partition sale as to preclude him from now gainsaying or attacking its validity. Equitable estoppel, or estoppel by conduct, so far as it relates to the trial of title to land, is defined to be: "That doctrine by which a party is prevented from setting up his legal title, because he has, through his acts, words or silence, led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience": *Sedgwick and Wait on Trial of Title to Land*, sec. 843. Whether the plaintiff is estopped depends upon the facts and circumstances of the case. It appears from the admissions and proofs that upon his arrival at the age of his majority, the plaintiff received in money from his guardian, in a settlement then had with him, his full *pro rata* share, as an heir at law of his mother, of the proceeds of the partition sale of the entire tract of land. There is no allegation, or pretense even, that the land when sold for partition did not bring its full and fair value at that time, or that the amount received by the plaintiff from his guardian as his share of the proceeds of such sale was not a full and fair equivalent at that time for his interest ²⁶² in the land sold. His half-sister and half-brother, through their guardian, became the purchasers at such partition sale, and thereby became clothed with some semblance of title by which they believed they became vested with a valid title to a one-half interest and estate, each, in and to said land. The parties have admitted that the plaintiff, at the time that he accepted from his guardian his share of the proceeds of such sale, was ignorant of the fact that the money arose out of or came from such sale, but it is not shown how long thereafter the plaintiff continued in ignorance of such fact. John G. Sinclair, from or through whom the

defendant derives his title, swears that the plaintiff, at the time he executed to him the warranty deed to the one-fourth interest in said forty acres of land (a part of which is the land in controversy), represented to him and told him that all the interest that he could own in said land was a quarter interest therein that he inherited from his deceased half-brother, Barnard Hughey. From the proofs it appears that all the parties acted under the belief that upon Barnard Hughey's death, his half-brother, the plaintiff, inherited an equal share of his half interest acquired at the partition sale, as did Barnard's sister of the full blood, Mary E., which would entitle the plaintiff, as he represented to Sinclair, to a one-fourth interest in the whole. This understanding was acted upon, too, by Mary E., since we find her conveying to Sinclair a three-fourths interest in the same forty acres only a short while before the plaintiff conveyed the remaining one-fourth interest therein. That the plaintiff did represent to Sinclair that his only interest in the land was that which he derived by descent from his deceased half-brother, and that such interest was a one-fourth interest, is not denied. He admits that ^{see} Sinclair purchased the other three-fourths interest from his half-sister, Mary E.

He remains silent and permits his half-sister to assert title in herself to three-fourths of the property, and in silence permits Sinclair to purchase such three-fourths interest from her, and asserts at the same time that he owns only one-half of his deceased brother's half-interest, or a fourth of said land, and upon such assertion sells and conveys such interest to Sinclair, waits in silence for nearly seven years until the land has ceased to be longer known by the government numbers of its original survey, as when sold by him, and has acquired a description as part of a city before undertaking to assail such partition proceedings. Though the plaintiff may not in fact have known at the time that he received from his guardian his share of the proceeds of the partition sale, the source from whence the money came, yet when his half-brother died and he became the claimant as his heir at law of one-fourth interest in the whole tract as being the equivalent of one-half of the interest that his deceased brother owned therein, he must have known that his brother's interest was a half-interest, and how his half-brother acquired such half-interest therein, that it was by means of such partition sale. If he was ignorant thereof, then, under the circumstances, in view

of his undenied assertions to Sinclair, such ignorance on his part was inexcusable. Sinclair swears that when he accepted the deed to the one-fourth interest from the plaintiff he would never have accepted it had he not believed, and had not the plaintiff asserted and believed, that such fourth interest was all the interest that the plaintiff had; and this is not denied or contradicted in any way. Holding himself out to Sinclair as being the owner by descent from his deceased half-brother of one-half of such deceased ²⁶⁴ brother's one-half, and actually receiving pay for and conveying such interest as being inherited from such brother, was a recognition and acknowledgment upon his part that his said half-brother did own a half-interest in the whole of such tract of land, and such half-interest being acquired by such half-brother at such partition sale amounted, under the circumstances, to such an acquiescence in and ratification by him of such sale that he is now estopped from assailing its validity.

The judgment appealed from is therefore affirmed.

PARTITION BY EXECUTORS OR ADMINISTRATORS: See the extended note to *Nichols v. Nichols*, 67 Am. Dec. 709. The executor and devisees of a deceased tenant in common may file a bill in chancery to have their interests in the land set off from that of the cotenant; *Page v. Webster*, 8 Mich. 263; 77 Am. Dec. 446.

PARTITION—INFANT DEFENDANTS.—Infants may be made parties to partition proceedings under the Missouri statute; *Thornton v. Thornton*, 27 Mo. 302; 72 Am. Dec. 266, and note with the cases collected. All parties having or claiming any interest in the land are necessary parties to a suit in partition; *De Uprey v. De Uprey*, 27 Cal. 329; 87 Am. Dec. 81, and note; *Portie v. Hill*, 14 Tex. 69; 65 Am. Dec. 99, and note; *Batterton v. Chiles*, 12 B. Mon. 348; 54 Am. Dec. 539.

EQUITABLE ESTOPPEL—HOW ARISES.—To create an equitable estoppel the person sought to be estopped must do some act or make some admission to influence the conduct of another, which is inconsistent with the claim he proposes now to make, and the other party must have acted on the strength of such act or omission; *New York Rubber Co. v. Rothery*, 107 N. Y. 310; 1 Am. St. Rep. 822, and note; note to *Weinstein v. National Bank*, 5 Am. St. Rep. 28; *Stewart v. Board of Commissioners*, 45 Kan. 708; 23 Am. St. Rep. 746; *Cowles v. Bacon*, 21 Conn. 451; 56 Am. Dec. 371, and note; *Caldwell v. Auger*, 4 Minn. 217; 77 Am. Dec. 515, and note; *Dress v. Kimball*, 43 N. H. 282; 80 Am. Dec. 163, and note.

CARNEY v. HADLEY.

[32 FLORIDA, 244.]

TRESPASS—JURISDICTION TO ENJOIN.—To give equity jurisdiction to enjoin a trespass the complainant's title must be admitted or legally established, and the trespass must be one which will cause irreparable damage, for which money cannot atone. Inadequacy of the legal remedy is the foundation and indispensable prerequisite for the interposition of equity.

TRESPASS—INJUNCTION AGAINST.—**INSOLVENCY OF DEFENDANT** alone is not sufficient to authorize the issuance of an injunction against a trespass, but it is an important element in determining whether or not the injunction should be granted.

TRESPASS—INJUNCTION.—**IN CASES OF REPEATED TRESPASSES** when it is necessary to quiet a rightful, admitted, or established possession, equity has jurisdiction to interpose by injunction to prevent a multiplicity of suits although a remedy exists at law. Injunction will not be granted against a person merely because he is guilty of repeated trespasses when the legal remedy affords an adequate and complete redress in damages.

TRESPASS—INJUNCTION AGAINST TRESPASS TO AVOID MULTIPLICITY OF SUITS will be granted only when several persons are controverting the same right, and each stands upon his own claim or pretension.

TRESPASS—INJUNCTION AGAINST.—**WHEN COMPLAINANT'S TITLE IS DISPUTED** an injunction to restrain a trespass will not be granted, nor will an injunction already granted be made perpetual, to prevent multiplicity of suits, until he has established his title by a successful trial at law.

TRESPASS—INJUNCTION AGAINST.—Trespass by working pine trees in the customary manner, although it greatly lessens their value as timber producers, does not, in the absence of allegations that the injury complained of amounts to a destruction of the trees or the estate, or that it cannot be adequately compensated in damages, present such a case of irreparable injury as will justify a court of equity in granting an injunction.

BILL in equity against Carney and others to perpetually enjoin them from going upon certain land to box trees thereon for turpentine, or to remove any turpentine therefrom. Judgment for plaintiffs, and the defendants appealed.

Mallory and Maxwell, for the appellants.

²⁴⁰ **MABRY, J.** According to the allegations of the bill before us, the acts, against the doing of which an injunction was sought and obtained, amounted to a trespass upon real estate. This trespass, according to the bill, consisted in entering upon the land of complainants, boxing the pine trees standing thereon for the production of turpentine and the removal of the turpentine from the trees and the land. The case arose and was determined in the circuit court before the enactment of chapter 3884, laws of 1889, and must be disposed of independently of the provisions of that act.

Courts of equity do not ordinarily extend the harsh remedy

of injunction to cases of trespass, but leave the redress of such grievances to the courts of law, where originally jurisdiction in such matters was lodged. It is said that originally courts of equity did not grant injunctions to restrain trespasses in any case, but whether in analogy to the remedy to prevent waste, or to prevent injuries supposed not to be adequately recompensed by damages in the legal forum, it is now firmly settled that injunctions will be granted to restrain trespasses under certain conditions. The inadequacy of the legal remedy is the foundation and indispensable prerequisite for the interposition of chancery in such matters, for the obvious reason that a legal remedy has been devised to redress such wrongs, and so long as the law provides an adequate remedy, equity has no right to interfere. The general rule, as has often been stated, is that in order to give the court of equity jurisdiction to enjoin torts to property, two conditions must concur:

1. The complainant's title must be admitted, or be established by a legal adjudication; and, 2, ²⁵⁰ the threatened injury must be of such a nature as will cause irreparable damage, not susceptible of complete pecuniary compensation. The courts have generally accepted the statement of the rule here given as correct, although they have encountered considerable difficulty in its application to the facts of the various cases that have arisen out of the complication of human transactions: *Jerome v. Ross*, 7 Johns. Ch. 315; 11 Am. Dec. 484; *Gause v. Perkins*, 3 Jones' Eq. 177; 69 Am. Dec. 728; *McMillan v. Ferrell*, 7 W. Va. 223; *Citizen's Coach Co. v. Camden Horse R. R. Co.*, 29 N. J. Eq. 299; *Echelkamp v. Schrader*, 45 Mo. 505; *Hamilton v. Ely*, 4 Gill, 34; *Catching v. Terrell*, 10 Ga. 576; *Mayor etc. v. Groshon*, 40 Md. 436; 96 Am. Dec. 591; *Indian River Steamboat Co. v. East Coast Transportation Co.*, 28 Fla. 387; 29 Am. St. Rep. 258. To authorize the issuance of the writ of injunction by a court of chancery the injury threatened must be of such a peculiar nature that compensation in money cannot atone for it. The view expressed by Chancellor Kent is, that "it must be a strong and peculiar case of trespass, going to the destruction of the inheritance, or where the mischief is remediless, to entitle the party to the interference of this court by injunction": *Jerome v. Ross*, 7 Johns. Ch. 315; 11 Am. Dec. 484. In one case of cutting timber where the petition alleged that the defendants were continuing the trespass with a view to

carrying away the timber, and that they intended, if not restrained, to take and carry away the timber (converted into cordwood) from the premises, and so dispose of it as to put it beyond the reach of petitioners, the court in holding this not to be sufficient, said: "We do not say that there may not be cases where the legal remedy would be incomplete, and in which an injunction might properly issue. For instance, as above suggested, the defendants might be ³⁵¹ entirely insolvent; the trespass might grow into a nuisance or waste; numberless suits might have to be brought in order to make the remedy complete; the trespass might be by a party occupying a fiduciary relation; or the injury of such a character that the loss would be irreparable, and not be compensated in dollars and cents; and in any such, or similar cases, an injunction might be proper": *Cowles v. Shaw*, 2 Iowa, 496.

It is apparent that quite a field for the exercise of chancery powers is here opened up, and many cases show that this court has extended its jurisdiction in the directions indicated. It is said that a more liberal practice prevails now in granting injunctions than obtained formerly. But the rule seems to have been adhered to, however, in the cases, that a clear case of the inadequacy of the legal remedy must be shown in order to justify the interposition of the court of chancery by the harsh remedy of injunction.

The trespasses alleged in the bill under consideration consist in entering the land of complainants and boxing trees for the production of turpentine. These trespasses are alleged to be continuous and frequent, and that the defendants reside in the state of Alabama and have no property in this state; also, unless the said defendants be restrained from their repeated and innumerable trespasses, complainants were remediless save by repeated, vexatious, and multiplied suits which would be fruitless in this state, because of the alleged want of property in this jurisdiction by the respondents. The answer positively denies the allegation in the bill that respondents were not possessed of any property in this state, and it is alleged that Carney, who is the only person asserting any claim to the land, owns at least six thousand acres in Escambia county, Florida. It seems that a suit for damages in reference ³⁵² to the subject matter of this proceeding and between the same parties is pending in Escambia county, Alabama. No effort was made on the part of appellees to establish the allegation that appellants were not possessed of

any property in Florida, but the showing made by the latter is clear that Carney at the time of filing the bill was possessed of considerable real property situated in Escambia county, Florida, amounting to at least six thousand acres. Insolvency is an element in determining whether or not the court should act in granting an injunction in the case. In *Gause v. Perkins*, 3 Jones' Eq. 177, 67 Am. Dec. 728, it is said that the "injury must be of a peculiar nature, so that compensation in money cannot atone for it; where from its nature it may be thus atoned for, if in the particular case the party be insolvent, and on that account unable to atone for it, it will be considered irreparable." And in many of the cases where injunctions have been granted to restrain trespasses the insolvency of the trespasser has been an important element. Our court has said that insolvency alone of the defendant will not be sufficient to authorize an injunction: *Pensacola etc. R. R. Co. v. Spratt*, 12 Fla. 26; 91 Am. Dec. 747. Under the proof in the record before us insolvency cannot be claimed in support of the decree. The showing is that one of the respondents, and who is the real party in interest in the subject matter of this suit, owns considerable property within the jurisdiction of the court, and is liable to any judgment for damages that may be recovered against him.

In cases of repeated trespasses where it is necessary to quiet a rightful, admitted, or established possession, chancery has often interposed to prevent a multiplicity of suits, although there may be a remedy at law, and this is a well-recognized head of chancery jurisdiction ²⁵³ when a proper case is presented. The court will not, however, grant an injunction against one person merely because he is guilty of repeated trespasses where the legal remedy affords an adequate and complete redress in damages. The rule, as stated by many decisions, is, that to justify the interference of a court of equity in cases of trespass in order to avoid a multiplicity of suits, there must be several persons controverting the same right, and each standing upon his own claim of pretension: *Jerome v. Ross*, 12 Johns. Ch. 115; 11 Am. Dec. 484; *Hatcher v. Hampton*, 7 Ga. 49; *Nicodemus v. Nicodemus*, 41 Md. 529; *Thorn v. Sweeney*, 12 Nev. 251; *Roebling v. First Nat. Bank*, 30 Fed. Rep. 744; High on Injunctions, sec. 700.

The bill is filed against Carney and two others alleged to be his foremen. Carney is the only person who is making any claim to the land as against appellees, and is the sole moving

agency in the alleged invasion of their rights. The other persons named are simply agents and servants, and they do not assert any claim to the land. What they do is for Carney and in his name, and the controversy in reference to the land is solely between appellees and appellant Carney. According to the rule just stated, there would be no occasion for the interference of chancery on account of the multiplicity of suits between the parties. But in addition to the rule mentioned, it seems to be clearly settled that whenever the complainant's title is disputed a court of equity will not interfere by injunction, or make perpetual an injunction already granted, on the ground of a multiplicity of suits, until he has procured his title to be established by a successful trial at law. The ground upon which this action is based is because, as a general thing, courts of equity do not try disputed ³⁵⁴ legal titles to land: 1 Pomeroy's Equity Jurisprudence, sec. 252; *Poyer v. Village of Des Plaines*, 123 Ill. 111; 5 Am. St. Rep. 494; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Irwin v. Davidson*, 3 Ired. Eq. 311; *Caro v. Pensacola City Co.*, 19 Fla. 766. The answer shows that the title of appellees was disputed, and an examination of the testimony in the record does not dispel the presence of a serious issue between the parties as to the legal title to the land in question. In any view we take of the case there is nothing to help the final decree in favor of appellees on the ground of the right of the court to interfere on account of a multiplicity of suits.

But can the decree in favor of appellees making the injunction perpetual be supported on the ground that appellants were committing an irreparable injury within the meaning of the rule already stated? It is safe to say that even in cases of the destruction of timber, by cutting and removing it from the land, it is not sufficient, in order to obtain an injunction, to simply allege that such cutting and removal amount to irreparable injury to the land, and a great damage and loss to the owner. In addition, it must appear that the trees are of such peculiar value and importance to the estate as that their destruction or injury will so affect the uses and purposes for which it is designed as to make their loss an irreparable injury to the owner. If adequate compensation can be made in money, the remedy is at law. In *Green v. Keen*, 4 Md. 98, the allegation as to the trespass was, in substance, that the defendant had entered upon the prem-

ises mentioned and had felled timber trees and other trees standing upon the land, and committed other and further waste thereon by driving wagons and other vehicles over the same, and had threatened to fell other timber trees on the land to its irreparable injury and to the great damage ^{see} and loss of complainant. This was held not sufficient to authorize an injunction.

It was alleged in *Shipley v. Ritter*, 7 Md. 408, 61 Am. Dec. 371, that complainant's home, consisting of two hundred and forty acres, had on a part of it timber consisting of oak, chestnut, hickory, and other growth common to the country, and that it was "particularly valuable and desirable to complainant as timber land, so much so that it would be and is attended with irreparable injury for the same to be cut down and destroyed, or converted into pasture or waste land; that a portion of said timber land, and the portion which is in part the subject of the waste and destruction hereinafter complained of, is so situated in reference to complainant's house and outbuildings that it affords them protection and shelter from the severity of the seasons of summer and winter, besides being ornamental, and that on these accounts also the waste and destruction hereinafter set forth and complained of is attended with and is an irreparable injury to complainant." The trespass of entering upon and destroying the timber by defendants was also alleged. The same court held this bill to be sufficient for an injunction. The principle applied here is this: the trespass complained of went to the destruction of that which was essential to the value of the estate, and to the destruction of the estate itself, in the character in which it had been enjoyed. When such an injury is inflicted it is irreparable, in the meaning of the rule, and cannot be compensated by the legal remedy, and hence a court of chancery, ever ready to prevent an injustice, steps forward with its restraining power to prevent the threatened injury. The character of the injury as being capable of compensation, or such as is irreparable in its nature, is the distinguishing feature in determining the ^{see} jurisdiction of chancery in such cases: *West v. Walker*, 3 N. J. Eq. 279; *Thompson v. Williams*, 1 Jones' Eq. 176; *Powell v. Rawlings*, 38 Md. 239; *Thatcher v. Humble*, 67 Ind. 444; *Hatcher v. Hampton*, 7 Ga. 49; *Thomas v. James*, 32 Ala. 723; *Hillman v. Hurley*, 82 Ky. 626.

The averments of the bill in *Gause v. Perkins*, 3 Jones' Eq.

177, 67 Am. Dec. 728, to which reference has already been made were that most of the land was fit for little else than the production of turpentine, staves, and timber, and that defendant had entered upon the land by his agents and servants and boxed some twenty-five thousand trees for producing turpentine, and had carried on the business of making turpentine on this land and carrying it off and selling the same in large quantities. Further, that he was overworking the trees, and in a few years they would be worn out, useless and unfit for making turpentine, and defendant was, at the time of filing the bill engaged in committing other wastes, spoil, and destruction upon the land, and was thus doing an irreparable injury to the land, and would render the same utterly useless and valueless unless he was restrained by injunction. The court decided in this case that the boxing of pine trees for turpentine, and working them for such purpose, was not destruction, and that the court could not see that the injury would be irreparable unless it was shown that the defendant was insolvent, and, on that account, unable to atone for any injury that he might do the complainant. In another case, *Bell v. Chadwick*, 71 N. C. 329, where an injunction against working pine trees for turpentine was sought, the court says: "It should be a very clear case of trespass, and irreparable mischief, to justify a court in crippling the industry of the country and preventing the full development of our resources." As was said ²⁵⁷ in a still later case, *McCormick v. Nixon*, 83 N. C. 113, the decisions in that state were placed upon the ground of justice to the party sought to be enjoined, and in obedience to public policy, which favors the use to which lands are adapted as means of developing the resources of the country.

We have been unable to find any case holding that the simple working of pine trees for turpentine in the customary manner was irreparable injury, to prevent which a court of equity would grant an injunction. In *Stevens v. Beckman*, 1 Johns. Ch. 317, the allegation, in effect, was that defendant had entered the premises, cut down and taken away timber, and that the part of the land on which such waste was committed was principally, if not exclusively, valuable on account of the timber. This was held insufficient to sustain the injunction. So far as the loss of the turpentine is concerned, or damage to the trees in the production of turpentine, the bill entirely fails to exhibit a case of irreparable injury. It is made to appear that the trees are valueless except for turpen-

tine and timber, and without them in a condition to produce turpentine and timber, the land would be of little value; also that appellees were being deprived of the turpentine by reason of the acts of appellants. It does not appear from this that the working of the trees for turpentine will be a destruction of them, nor does it appear that the alleged injury is of such a nature as that it cannot be fully compensated in damages. There is an allegation in connection with the above that the extraction of the turpentine from the trees greatly lessens their value as timber-producing trees, but here again there is an absence of any clear showing that the injury resulting from this source amounts to a destruction of the estate, or is such as cannot be fully atoned ³⁵⁸ for in money, and that a recovery for the damage done to the trees as timber in working them for turpentine would not be full and adequate for all the injury sustained. There is no special allegation of damage showing that pecuniary compensation will not compensate for all the loss.

The court, we think, was in error in not dissolving the injunction on final hearing, without reference to the question of appellee's title. The answer denied the title and possession of appellees, and on the proof it is contended by appellants that the court should have refused relief on the ground of want of title in appellees. What we have said disposes of the case, and we need not discuss the question of title.

The decree of the court should be reversed, and it is so ordered.

INJUNCTIONS TO RESTRAIN TRESPASSES.—An injunction will be granted to restrain a trespass when the injury is irreparable, or where adequate relief cannot be granted at law, or where the trespass goes to the destruction of the property, or where it is necessary to prevent a multiplicity of suits, or where the trespasser is insolvent: *Indian River Steamboat Co. v. East Coast Transportation Co.*, 28 Fla. 387; 29 Am. St. Rep. 258, and note. Or where the trespass is of a continuing nature: *Miller v. Lynch*, 149 Pa. St. 460. For a thorough discussion of this subject, see the notes to the following cases: *Godfrey v. Black*, 7 Am. St. Rep. 546; *Reddall v. Bryan*, 74 Am. Dec. 555; *Mayor etc. v. Groshon*, 96 Am. Dec. 596; *Ryan v. Brown*, 100 Am. Dec. 161; *White v. Flannigan*, 54 Am. Dec. 681, and the extended notes to the following cases: *Jerome v. Ross*, 11 Am. Dec. 498-507; and *Smith v. Gardner*, 53 Am. Rep. 346-355.

INJUNCTIONS TO RESTRAIN TRESPASSES—MULTIPLICITY OF SUITS.—A trespass continuous in its nature may be enjoined to prevent a multiplicity of suits and vexatious litigation: *Mills v. New Orleans Seed Co.*, 65 Miss. 391; 7 Am. St. Rep. 671; *Lembeck v. Nye*, 47 Ohio St. 336; 21 Am. St. Rep. 828; *Indian River Steamboat Co. v. East Coast Transportation Co.*, 28 Fla. 387; 29

Am. St. Rep. 258; *Livingston v. Livingston*, 6 Johns. Ch. 497; 10 Am. Dec. 263.

INJUNCTIONS TO RESTRAIN TRESPASSES—INSOLVENCY OF DEFENDANT: See note to *Jerome v. Ross*, 11 Am. Dec. 505. An injunction may issue to restrain a trespass where the defendant is insolvent, and the injury to the complainant's property would be otherwise irreparable: *Lyon v. Hunt*, 11 Ala. 296; 46 Am. Dec. 216; *Indian River Steamboat Co. v. East Coast Transportation Co.*, 28 Fla. 387; 29 Am. St. Rep. 258.

INJUNCTIONS TO RESTRAIN TRESPASSES.—NECESSARY TITLE OF COMPLAINANT: See the extended note to *Jerome v. Ross*, 11 Am. Dec. 506. An injunction to stay waste will not be granted against a defendant in possession under an adverse title: *Poindexter v. Henderson*, Walker, 176; 12 Am. Dec. 559.

ECKMAN v. MUNNERLYN.

[23 FLORIDA, 367.]

CHATTEL MORTGAGES—POSSESSION AND SALE OF GOODS BY MORTGAGOR—

RIGHTS OF CREDITORS.—A mortgage of a stock of goods under which the mortgagor is permitted, by agreement, in or out of the mortgage, but executed at the same time, to sell the goods at discretion, or in the usual course of trade without any agreement to account for the proceeds, is fraudulent and void as to the existing creditors of the mortgagor without regard to the intent of the parties to the mortgage. Such creditors may maintain an attachment proceeding against the mortgagor on the ground that they have reason to believe that he will fraudulently part with his property before judgment can be recovered against him.

Phillips and Carter, for the appellants.

R. H. Liggett, for the appellees.

363 MABRY, J. Samuel H. Eckman and Abraham Vetsburg, as copartners, doing business in the firm name of Eckman and Vetsburg, commenced in the circuit court for Hillsborough county, Florida, on the tenth day of December, A. D. 1888, a suit of attachment returnable rule day in January, 1889, against J. K. Munnerlyn. The affidavit upon which the attachment is based was made by an agent of the plaintiffs, and, after reciting that fact, states: "that James K. Munnerlyn, of the county of Hillsborough, is justly indebted to the said Eckman and Vetsburg in the sum of nine hundred and forty-five and 60-100 dollars, and that the said amount is actually 364 due, and affiant has reason to believe that the said James K. Munnerlyn will fraudulently part with his property before judgment can be recovered against him." On the day of the issuance of the attachment writ it was levied upon certain real estate situated in Hillsborough

county, as the property of the defendant in attachment, and on the twenty-eighth day of the same month it was further levied upon a part of a stock of goods belonging to defendant, being in a certain storehouse in Clear Water Harbor, an inventory of the same being referred to in the sheriff's return. The defendant Munnerlyn entered a motion on rule day in January, 1889, to dissolve the attachment, and filed an affidavit traversing the ground upon which it had issued. An additional motion to dissolve the attachment was made on the sixteenth day of January, 1889, on the grounds:

1. That the bond of attachment was not executed by plaintiffs.

2. That said attachment bond is executed in the firm name of Eckman and Vetsburg, and not by the individual members of the copartnership.

A jury was waived, and the cause submitted to the court, and the following judgment entered, viz: "This cause coming on to be heard upon traverse of the plaintiffs' affidavit, and upon motion to dissolve the attachment herein, the court having heard and examined the evidence and testimony, and listened to the argument of counsel, and being fully advised in the premises, the court being satisfied that there is not sufficient evidence presented to sustain the allegations in the plaintiffs' affidavit for attachment, it is therefore ordered that said attachment be, and the same is hereby, dissolved, and the property held by the sheriff ³⁷⁰ thereunder be released and restored to the defendant herein."

The bill of exceptions recites that the objections to the execution of the bond were overruled by the court, but that the attachment was dissolved, and the property held by the sheriff thereunder be released and restored to defendant. Plaintiffs below appealed from the judgment of the court, and the assignment of error here is, that the court erred in granting the order dissolving the attachment. On the issue made by the traverse of the ground alleged in the affidavit for attachment, plaintiffs read without objection the said affidavit, and introduced P. S. Coggins, who testified that he was the agent for plaintiffs, and had been for three and one-half years, and made the affidavit on which the attachment was based. Two days before the attachment was sued out witness presented statement of plaintiffs' account to Munnerlyn, and he admitted it to be correct. Witness asked Munnerlyn to pay the account, but he said he could not do so, and did not have

the money. Munnerlyn was then asked to pay a part of the account, and he said he could not do it. He was then asked to secure the debt in some way, but said he could not do that, and told witness that C. B. Rogers & Co. had a mortgage on his property. Witness afterwards told Munnerlyn that he (witness) was out of traveling money, and needed some, and Munnerlyn agreed to let witness have it on his own account. Munnerlyn paid nothing on the account, and owed plaintiffs about sixteen hundred dollars. Witness heard other drummers say that they could get nothing from Munnerlyn, and some were going to sue, and others attach. Ed Clark said he would only sell Munnerlyn goods for cash. Tunno told witness that Munnerlyn was in failing circumstances. No ³⁷¹ one told witness that Munnerlyn was trying to dispose of his property fraudulently. Munnerlyn said he had about \$300 belonging to other parties, but it was placed with him on deposit. Witness and Munnerlyn went together to Duneden, and on the way Munnerlyn consulted his lawyer. Sommerville, of Duneden, told witness that Munnerlyn had been down there to get title to some land from Douglass and Sommerville put in himself (Munnerlynn).

Plaintiffs introduced in evidence three mortgages executed by Munnerlyn and wife to C. B. Rogers & Co., to secure an alleged indebtedness therein. The first one was executed and acknowledged on the nineteenth day of December, 1885, to secure the payment of four promissory notes bearing date November 12, 1885, each for \$1,000, with interest at 8 per cent until paid, and due respectively six, twelve, eighteen, and twenty-four months from date. The property described in this mortgage is certain real estate situated in Clear Water Harbor, Hillsborough county, and also a "stock of merchandise" situated in a mentioned store building in the said town of Clear Water Harbor. This mortgage was not admitted to record until the twentieth day of September, 1888. The second mortgage, executed by J. K. Munnerlyn alone, to C. B. Rogers & Co., bears date December 15, 1888, and was filed for record and recorded the eighteenth day of December, 1888. This mortgage recites that the said Munnerlyn "is justly indebted to the said party of the second part (C. B. Rogers & Co.) in the sum of \$4,320, which indebtedness is now witnessed by four certain promissory notes for \$1,080 each, dated December 13, 1888, and due respectively at six, twelve, eighteen months, and two years from date, the pay-

ment thereof being secured by a mortgage executed December 13, 1888, by James ³⁷³ K. Munnerlyn and Sarah J. Munnerlyn, his wife, to said parties of the second part herein. And whereas the said parties of the second part consider that said mortgage upon said property therein described is not sufficient to secure them for the amount due upon said notes, now therefore, in consideration of the indebtedness above described, and the further consideration of one dollar in hand paid," and to further secure said indebtedness the mortgagor conveys all the stock in trade of goods, wares, and merchandise in a store on Cleveland street, Clear Water Harbor, upon condition of defeasance upon the payment of said notes. This mortgage contains a clause that the said mortgagor shall retain possession of said granted property, but on default of payment of said notes, or any attempt on his part "to sell said goods except in the usual retail way, and that he will pay over the money received therefrom to the said parties of the second part as the goods are sold, or to remove therefrom the county of their present location, or upon any seizure of them by any process of law, then the said parties of the second part" may take possession of said property. The third mortgage being executed by Munnerlyn and wife to C. B. Rogers & Co., bears date the twenty-first day of December, 1888, and purports to convey four lots in Clear Water Harbor, additional to what is conveyed in the first-mentioned mortgage, and for the purpose of securing the payment of \$4,320. It contains the following clause, viz: "This mortgage being given to further secure the payment of the notes for the above amount given by the parties of the first part herein on December 13, 1888, and secured by a mortgage of even date herewith, said notes being for \$1,080 each, and due respectively six (6), twelve (12), eighteen (18) months and two years ³⁷³ from date, with 8 per cent interest until paid." It is the usual mortgage in other respects, and was admitted to record the thirty-first day of December, 1888. It was admitted that Munnerlyn made an assignment on December 29, 1888, of all his property, preferring certain of his creditors, first among them C. B. Rogers & Co. for \$4,320. The assignment is not before us, and all we know of it is from the admission above stated. This was the testimony for plaintiffs.

Munnerlyn, in his own behalf, testified that he executed to C. B. Rogers & Co. the mortgage bearing date December 19,

1885, and that he owed said firm the \$4,000 in this way: When he (Munnerlyn) bought the property on which the mortgage was given, C. B. Rogers & Co. held a mortgage on the same given by Mr. Turner, the owner, and that he (Munnerlyn) assumed this mortgage. The stock at that time was worth about \$2,500. He had never paid any of the principal of the mortgage debt, but had paid the interest up to the last time, and in making the new mortgage had included the last year's interest. The wife of C. B. Rogers was the sister of Munnerlyn's wife. He (Munnerlyn) had continued in possession of the store and goods from the time of giving the mortgage up to the time of the levy of the attachment, and had sold the goods in the usual course of business; had sold out part of the original stock and purchased new goods. He had tried to raise the money to meet these claims, and another party named had been trying to raise money for him on some property, and that he had asked his creditors for time. When he and Coggins went to Duneden he (Munnerlyn) consulted with his attorney as to what was best to be done, and discussed making an assignment, but concluded it would do no good. Did make an assignment December ²⁷ 29, 1888, of all his property, except his constitutional exemptions, for the benefit of his creditors, preferring certain of them, and C. B. Rogers & Co. first for \$4,320. He had been offered \$3,500 for a part of the property mortgaged in 1885, but had refused it. At the time of testifying, his stock was worth about \$4,000.

On the testimony, substantially as above given, the decision of the court was adverse to the plaintiffs. There is no controversy as to the indebtedness, and the question for our consideration is whether or not the court was correct in holding that the affiant in the attachment affidavit did not have good reason to believe when the writ was sued out that the defendant would fraudulently part with his property before judgment could be recovered against him: *Meinhard v. Lilienthal*, 17 Fla. 501. It has been decided in this state that a mortgage of a stock of goods by the owner, under which the mortgagor is permitted by the mortgagee to sell the goods at his discretion, or in the usual course of business, is fraudulent and void as to the creditors of the mortgagor: *Logan v. Logan*, 22 Fla. 561; 1 Am. St. Rep. 212. This has been a vexed question in the courts of this country, and many able decisions are to be found on both sides of it. In the case of *Robin-*

son v. *Elliott*, 22 Wall. 518, the supreme court of the United States unanimously held that a mortgage providing for the retention of the mortgaged goods, wares and merchandise by the mortgagor until after default in the payment of some portion of the debt attempted to be secured, with power to sell the same in the usual course of trade, and to supply their places with other goods to be substituted when bought, to the lien of the mortgage, was void in law upon its face as to creditors of the mortgagor. In recent decisions of the same ²⁷⁵ court there are expressions of judges indicating that if the question was an open one, a different view would be preferred: *Vide Etheridge v. Sperry*, 139 U. S. 266. The decision in our own court (*Logan v. Logan*, 22 Fla. 561; 1 Am. St. Rep. 212) is sustained by many decisions, and so far as it has gone is the law here. In this case it appeared that by the terms of the mortgage the mortgagor had the right to dispose of the merchandise at will, but the opinion quotes the views of Pierce on Mortgages of Merchandise, to the effect that the same result follows whether by the terms of the mortgage the mortgagee permits the goods to be sold in the usual course of trade, or where such agreement or understanding of the parties appears by proof *aliunde* the mortgage.

In *Southard v. Benner*, 72 N. Y. 424, it is said: "Whether the agreement is in or out of the mortgage, whether verbal or in writing, can make no difference in principle. Its effect as characterizing the transaction would be the same. The difference in the modes of proving the agreement cannot take the sting out of the fact and render it harmless. If it be satisfactorily established, the result upon the security must be the same. It is the fact that such an agreement has been made and acted upon that in law condemns the security, and not the fact that it is proved by the instrument of suretyship instead of by parol, or in some other way." The conclusion of the court in *Freeman v. Rawson*, 5 Ohio St. 1, is summed up as follows, viz: "From the considerations and authorities we have adduced, we are of opinion that these conclusions necessarily follow: That a mortgage of personal property, with possession, and a power of disposition reserved to the mortgagor, is fraudulent and void as against his other creditors. If the power of disposition appear ²⁷⁶ upon the face of the mortgage, or is fairly to be inferred from its provisions, it is the duty of the court so to declare it, without submitting the matter to the jury as a question of fact. If it does not so

appear, but is so understood or agreed by the parties at the time the mortgage is executed, it is equally void; and such understanding or agreement may be shown by parol evidence, and may be proved by the conduct of the parties in relation to the subject matter of the mortgage, and other circumstances, as in other cases. And that in either case, where the fact is made to appear, the mortgage is fraudulent in law, irrespective of the intention of the parties." There are many decisions sustaining this view: *Barnet v. Fergus*, 51 Ill. 352; 99 Am. Dec. 547; *Horton v. Williams*, 21 Minn. 187; *Stein v. Munch*, 24 Minn. 390; *Orton v. Orton*, 7 Or. 478; 33 Am. Rep. 717; *City Nat. Bank v. Goodrich*, 3 Col. 139; *Putnam v. Osgood*, 52 N. H. 148; *Steinart v. Deuster*, 23 Wis. 136; *Chetham v. Hawkins*, 80 N. C. 161; *Harman v. Hoskins*, 56 Miss. 142; *Googins v. Gilmore*, 47 Me. 9; 74 Am. Dec. 472. The case of *Ephraim v. Kelleher*, 4 Wash. 243, cited by counsel for appellee, belongs to that class of decisions holding that a clause in the mortgage giving the mortgagor a right to sell is not fraudulent in law. Where the agreement to sell is contained in the mortgage, it is settled here that it is fraudulent in law as to the mortgagor's creditors, and it is the duty of the court to so declare. If such agreement or understanding of the mortgagor and mortgagee be not found in the mortgage itself, some decisions maintain that the question of whether there is any such understanding, as well as what are the inferences of fraud arising from it, is one for the jury: *Williston v. Jones*, 6 Duer, 504; *Smith v. Acker*, 23 Wend. 653; *Kavanaugh v. Beckwith*, 44 Barb. 192. In the case ²⁷⁷ before us a jury was waived, and the court decided the issue.

The conclusion from the evidence is irresistible that from the time of executing the mortgage in December, 1885, up to the levy of the attachment, Munnerlyn continued to sell and dispose of the stock of goods therein mentioned in the usual course of business, and that this was done with the understanding and consent of the mortgagees. There was no attempt to perfect the lien of the mortgage, so far as the stock of goods is concerned, by its record, until a short time before the attachment suit was commenced, and after its record the same course of business was pursued by the mortgagee until the levy of the writ. Two days before the levy when demand for payment was made by appellants' agent he was informed by Munnerlyn that C. B. Rogers & Co. had a mortgage on his (Munnerlyn's) property. The validity of the mortgages,

as between C. B. Rogers & Co. and appellants, or as between said firm and Munnerlyn, is not involved in the question now before us. Considering the mortgages executed by Munnerlyn to C. B. Rogers & Co. subsequent to the suing out of the attachment only as explanatory of conduct prior to that date, the one on merchandise indicates that the parties thereto designed a better security than that already existing on the stock, and to change the legal effect of the past security by reason of the permissive sales thereunder by requiring the proceeds to be paid to the mortgagees as the goods were disposed of under the subsequent mortgage. We do not say that the subsequent chattel mortgage of December 15, 1888, by reason of the clauses therein in reference to possession of the goods, is fraudulent in law upon its face. But conceding its validity here, it tends to strengthen the conclusion that under the former mortgage the mortgagor ²⁷⁸ had the right to dispose of the goods at will in the usual course of trade without any agreement as to the disposition of the proceeds. We think it is at least *prima facie* shown by the evidence before us, without anything to rebut it, that by the understanding and agreement of the parties, Munnerlyn was permitted to sell the stock of goods described in the mortgage executed in 1885, and recorded in September, 1888, in the usual course of trade without any agreement as to what he would do with the proceeds; and whether we hold such sales under such an understanding to be fraudulent in law as against Munnerlyn's creditors, or as proof of such fact, the conclusion here will be the same. Such an understanding between mortgagor and mortgagee if not conclusively fraudulent in law, is at least *prima facie* evidence of fraud. *Vide* authorities *supra*. A conclusion on the evidence in this record, that there was no such understanding or agreement, would be against the evidence. Munnerlyn himself says that he had continued in possession of the store and goods from the time of executing the mortgage in 1885, up to the time of the levy of the attachment, and that he had continued during all this time to sell the goods in the usual course of trade. There is no evidence rebutting the conclusion that such an understanding did exist. The disposition of the merchandise under such an understanding and arrangement is inconsistent with the rights of creditors, and if sustained would afford an effectual shield of the debtor's property from liability to seizure while he retained not only the use of it, but an abso-

lute power of disposition, without accounting to either the mortgagees or other creditors for the proceeds. "The effect is, of course, that the property thus shut up from the reach of general creditors may ³⁷⁹ be entirely disposed of without the proceeds going either to the outside creditors or to the beneficiaries in the deed. The only party certainly benefited by it is the debtor or grantor who has the power to convert every portion of the property to his own use. The deed, if sustained, would serve the purpose of protecting the property against the grantor's creditors, and, at the same time, authorize him to convert it to his own use by an absolute sale": *State v. Tasker*, 31 Mo. 445; *Lesser v. Glaser*, 32 Kan. 546.

There are certain acts which, under particular circumstances, the law pronounces fraudulent. They may be innocently intended, so far as the idea of moral turpitude goes, yet their inevitable tendency is so uniformly against fair dealing that they are stamped with a fraudulent character, regardless of the honesty of the particular transaction. Wade says: "The class of cases in which this question has been most earnestly discussed, and in respect to which the most pronounced difference of opinion seems to exist, is that embracing mortgages of stocks in trade. On the one hand, it has been maintained that the mere fact that the mortgagor is permitted to remain in possession of the goods, and continue to sell and dispose of them in the ordinary course, does not necessarily render the mortgage fraudulent as against creditors. On the other, it is claimed that such an encumbrance amounts to a conveyance to the use of the grantor, and is fraudulent *per se*, even when the act is entirely disconnected with any intentional fraud. Where the former view is supported, it is claimed that the question of fraud is one of fact, to be proved by showing an intention to hinder, delay, or defraud other creditors than the mortgagees. Those holding to the latter view condemn the transaction, not because it is in fact and ³⁸⁰ intention fraudulent, but for the reason that it is such a convenient cover for active fraud, where exposure is made to depend upon testimony of those who are participants and beneficiaries. The latter view is, of the two, better supported on both principle and authority": 1 Wade on Attachment, sec. 96, p. 205.

The execution of the mortgage on the stock of goods and the continued disposal of them in the usual course of business with the consent and understanding of the mortgagees,

amounted to a fraud upon the other creditors of the mortgagor, and they had a right to so regard it. Munnerlyn, when payment was demanded by the agent of appellants, stated that he could not meet the demand, and gave as a reason that C. B. Rogers & Co. had a mortgage on his property, thereby affording good grounds for such agent to believe that as between Munnerlyn and said mortgagees all of the former's property was then subject to the mortgage under which he was then selling the goods in the usual course of trade. The agent had a right to rely upon the statement of Munnerlyn himself that the mortgage referred to covered all of his stock of goods at that time, although it did not in terms embrace subsequent additions to the stock. Such conduct will sustain an attachment on the ground that plaintiffs have good ground to believe that defendant will fraudulently part with his property before judgment can be recovered against him.

The decision of the court in the record before us was therefore erroneous in the traverse of the attachment affidavit, and should be reversed.

CHattel MORTGAGES—POSSESSION AND SALE OF GOODS BY MORTGAGOR. When a chattel mortgage authorizes the mortgagor to sell or dispose of the whole of the property, without providing what shall be done with the proceeds of the sale, such mortgage is void as in fraud of the creditors of the mortgagor: *Rathbun v. Berry*, 49 Kan. 735; 33 Am. St. Rep. 389, and note. This question is thoroughly discussed in the monographic note to *Penbody v. Landon*, 15 Am. St. Rep. 912.

MARSHALL v. REAMS.

[22 FLORIDA, 499.]

PARENT AND CHILD—RIGHT TO CUSTODY OF ILLEGITIMATE CHILD.—The mother has the superior legal right to the custody and control of her minor illegitimate children, and can transfer such custody and control to another. This legal right in the mother or her transferee is not absolutely beyond the control of other attendant circumstances.

PARENT AND CHILD—CUSTODY OF MINORS.—In applications for the custody of minor children the court is not bound to deliver the child to the claimant, but may, if the interest of the child demands it, leave it where its welfare will be best promoted.

PARENT AND CHILD—CUSTODY OF MINORS—ELEMENTS CONTROLLING.—In a contested application for the custody of a minor child the benefit and welfare of the child are most to be regarded. The ties of nature and of association, the character of the applicant, the child's age, health, and sex, the moral or immoral surroundings of its life, the benefits of educa-

tion and development, the pecuniary prospects, as well as many other considerations, should influence the judicial determination, and the choice of the child when it has reached the age of intelligent discretion also plays an important part as between rival claimants to the same custody.

PARENT AND CHILD—CUSTODY OF MINOR—RIGHT OF CHILD TO CHOOSE.

In a contested application for the custody of a minor child, such child, if it has reached the age of discretion, may often be allowed to make its own choice, though the person chosen is not the one whom the court would voluntarily appoint; but this is no controlling legal right of the child. Welfare controls choice, and the choice of the infant cannot be permitted to lead it into improper custody. The court is also bound to respect the rights of the parent or guardian, and cannot allow these rights to be overthrown by the mere wishes of the child when such parent or guardian is a proper person to be intrusted with the child.

PARENT AND CHILD—CUSTODY OF MINOR—RIGHT OF CHILD TO CHOOSE.

In a contested application for the custody of a minor child the wishes of the child of sufficient capacity to choose for itself should be given special consideration when its parents have for a long time voluntarily allowed it to live in the family of another, and no coercive order will be made in such case to enforce the mere legal right of the parent to the custody as against the manifest inclination and reasonable choice of the child to remain where it is.

PARENT AND CHILD—CUSTODY OF MINORS.—AGE OF DISCRETION OF CHILD

TO CHOOSE the custody to which it should be committed is not fixed, but mental capacity is the test, and when the minor shows sufficient capacity mentally to exercise an intelligent choice, and no objection can be made to the person chosen, the court ordinarily allows such choice to prevail, regardless of the age of the child.

PARENT AND CHILD—CUSTODY OF MINORS—ELEMENTS AFFECTING RIGHT

TO—RIGHT OF CHILD TO CHOOSE.—A parent, or one standing *in loco parentis*, may moderately chastise for correction a child under his control or authority. If such child has been committed by its parent to an uncle to raise, and he has inflicted immoderate and cruel punishment to such an extent as to alienate its affections and to cause it to desire a liberation from his control, the court should not, on *habeas corpus*, restore the child to the uncle when it appears that the child has reached an age of intelligent discretion, and has deliberately chosen to remain with a stranger against whom no objection can be made, and who has obligated himself to provide for the child in a manner more favorable than would be its condition with its uncle.

J. R. Challen, for the appellant.

John Wallace, for the appellee.

see **MABRY, J.** Henry Reams, in his petition for *habeas corpus* presented to the circuit judge, alleged that F. F. Marshall, without lawful authority, held in custody one Edward Reams, a minor, and that petitioner was entitled to the custody and control of said minor. The right to the custody and control of the minor is based upon the alleged fact that his mother before her death gave him to petitioner, his uncle,

as his own child, to raise and educate until he became twenty-one years old, and that petitioner has raised him from the age of three years up to the time of filing the petition, when he was between fifteen and sixteen years old. The mother of this child was unmarried, and the petition alleges that he had no father.

In his return to the writ F. F. Marshall states that he held in his care and custody the person of Edward Reams by virtue of an order, judgment, and decree of the court of the county judge of Duval county granting and assuring the custody of said minor to him by an indenture of apprenticeship then in full force and effect; that the minor, Edward Reams, was over sixteen years old, and desired to remain in the care and custody of him, said Marshall, who is able and willing to care for, educate, and prepare him for future usefulness ^{and} independence, and that the petitioner, Henry Reams, was unfit and unable to care for, educate, and train the said Edward Reams, and had treated him so unkindly and cruelly as to alienate him, and he refuses to go to, and positively refuses to live with, the said petitioner. The return also denies that Edward Reams was given to petitioner as alleged, and that he raised him.

The circuit judge, after hearing the evidence, awarded the care and custody of the person of Edward Reams during his minority to the petitioner, Henry Reams, as it appeared that he was a proper person to have such care and custody, and that Marshall pay the costs of the proceedings. Marshall has sued out a writ of error.

The testimony tends to show, and we accept it as sufficient to sustain the conclusion, that the boy, Edward Reams, when not over three years old, was given by his mother just before her death to her brother, Henry Reams, to raise and care for during minority, and that with the exception probably of one or two years immediately after the mother's death, this boy has remained continuously in the family and under the control of his uncle up to the time he went into the employment of plaintiff in error, which was some time in May, 1893. The boy's mother was unmarried and he had no father.

The mother has the superior legal right over all others to the custody and control of her minor illegitimate child. No claim of the father is presented in the case before us, and it is perfectly clear from the authorities that the mother of Edward Reams had the legal right to transfer his custody to her

brother Henry. Some of the English cases say that the right of the mother to the control of an illegitimate child continues until it ⁵⁰² arrives at the age of fourteen, when it may exercise a choice. The two recent cases of the *Queen v. Nash*, 10 Q. B. Div. 454, and the *Queen v. Barnardo*, 1 Q. B. Div. (1891), 194, fully discuss the custody of illegitimate children in England.

The case of *Jones v. Harmon*, 27 Fla. 238, recognizes the right of the mother of an illegitimate child to transfer its custody to another, and we need not stop to cite authorities to sustain this well-established rule of law. The result is that the custody of Edward Reams by his uncle, Henry Reams, was rightful as being derived from the mother who had the right to transfer such custody. But this legal right in the mother or her transferee is not absolute and beyond the control of other circumstances that may surround the case. In applications for the custody of children it may be stated as a general rule sustained by the law that the court is not bound to deliver the child to the claimant, but may, where the interest of the child demands it, leave it where its welfare will be best promoted. "It is the benefit and welfare of the infant to which the attention of the court ought principally to be directed." This, it is said, is the "pole star" by which courts are guided in all such cases, whether the contention be between father and mother, or between them and a third person, or between strangers: *Mercein v. People*, 25 Wend. 64; 35 Am. Dec. 653; *State v. Smith*, 6 Greenl. 462; 20 Am. Dec. 324, and notes; Church on Habeas Corpus, 2d ed., sec. 446, and authorities cited in note 1.

The ties of nature and of association, the character of the applicant for the child, its age, health, and sex, the moral or immoral surroundings of its life, the benefits of education and development, and pecuniary prospects, as well as many other considerations, enter into ⁵⁰³ the judicial determination. The choice of the child where it has reached the age of intelligent discretion also plays an important part in cases of rival claimants to the same custody. It is said in Church on Habeas Corpus, section 447:

"Where the child has reached the age of discretion, it will often be allowed to make its own choice, although the person chosen is not one whom the court would voluntarily appoint. But this is no controlling legal right of the infant. It is not entitled to its absolute freedom from all custody, but

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"Where the child has reached the age of discretion, it will often be allowed to make its own choice, although the person chosen is not one whom the court would voluntarily appoint. But this is no controlling legal right of the infant. It is not entitled to its absolute freedom from all custody, but

an adult is. It is not the whim or caprice of the child which the courts respect, but its feelings, its attachments, its preferences, and its probable contentment; and it is a well-settled rule of law that whether the court will regard the preference of a infant depends upon the reasonableness of his wish, and the intelligence which he manifests. 'Welfare' controls 'choice,' and the court will not permit the choice of the infant to lead it into an improper custody. The court is also bound to respect the rights of the parent or guardian, and will not allow these rights to be overthrown by the mere wishes of a child who has not reached years of discretion, and who is too young to choose for itself, where such parent or guardian is a proper person to be intrusted with the child. The wishes, however, of children of sufficient capacity to choose for themselves should be given especial consideration when their parents have for a long time voluntarily allowed them to live in the family of another, and the court will make no coercive order in such cases to enforce the mere legal right of the parent to their custody against the manifest inclination and reasonable choice of the children to remain where they are": Hurd on Habeas Corpus, 532, 538.

See The decisions in this country do not fix any definite number of years when the age of discretion begins, but mental capacity is the test, and when the minor shows sufficient capacity mentally to exercise an intelligent choice, and no objection can be made to the person chosen, the court will ordinarily allow such choice to prevail: Church on Habeas Corpus, sec. 443. In *In re Goodenough*, 19 Wis. 274, Chief Justice Dixon said that: "when the infant is above the age of fourteen years he must, it seems, in every case choose for himself. The court will not compel him, upon *habeas corpus*, to submit to parental authority." Whether or not this be the correct rule we do not say, but the mental capacity of the child, and the reasonableness of its choice, will be considered in doubtful cases in determining a proper custody.

An application of the foregoing rules to the facts of the case before us impresses us with the view that the circuit judge committed an error in awarding the custody of the person of Edward Reams to the petitioner, Henry Reams. In arriving at this conclusion it is not necessary that we determine the legal effect of the apprenticeship proceedings before the county judge as a bar to the relief asked in this

suit, and we do not decide anything in reference to this phase of the case.

We will not go into a minute discussion here of all the testimony, but confine ourselves to a statement of what is the effect of it. It shows, in addition to the gift and custody of the boy as already stated, that Henry Reams has a large family, consisting of eight children, and has twenty-three acres of land on which he raises truck. Henry testified that he had brought up in his own family the boy, and had clothed, fed, and educated him as one of his own children, and in ⁵⁰⁵ this statement he is corroborated by his wife and other witnesses, but neither he nor any of his witnesses say how his children had been treated, clothed, or fed. Henry admits that he had hired out the boy to catch fish and chop wood, but says that he never gave him work too hard for him.

The other testimony tends strongly to show that the boy's work was rather heavy for him. It is also made to appear, we think, that the boy was poorly clothed and shod by his uncle, and this showing is not overcome by the general statement that the boy, Edward, was treated the same as the other children of Henry. As near as we can ascertain from the testimony, Edward Reams is about sixteen years old, and it is perfectly clear that he has become thoroughly alienated from his uncle and his uncle's wife. He was examined before the court, and testified that his uncle had not treated him well, and that he had been made to undertake work that he could not do, and was whipped by his uncle for failing to do it, and that he had been compelled to fish by dragging a seine in cold weather with ragged clothes, and shoes with his feet sticking through. He stated that he had been often whipped by his uncle, and had been hit by him on the head with a hammer handle that made a scar then to be seen, and that he then had scars on his body from beatings inflicted by his uncle. Dr. Marshall corroborates this statement as to the scars on the person, and also says that when he first saw the boy he was in rags. It is also made to appear that Henry Reams whipped the boy on his return from the house of Dr. Marshall for looking into "Aunt Linda's" basket. It seems the boy told his uncle that Mrs. Marshall had requested that he look into the basket of "Aunt Linda" for sugar and things when she went away. The boy testifies that his uncle claimed that it was for looking into the ⁵⁰⁶ basket that he whipped him, but the boy says the whipping was for getting

a pair of shoes, and not for looking into the basket. He further testifies that he did not want to go back to his uncle, and that he would not go back, but preferred to live with Dr. Marshall. Henry Reams, though examined in rebuttal, did not deny hitting the boy on the head with the hammer handle, or that he inflicted scars on his person. He stated that he whipped the boy whenever he needed it, and that he whipped him on his return from Marshall's house for looking into "Aunt Linda's" basket, but it was with a small switch about eight inches long. Edward Reams stated that this whipping was with a whip about three feet long. It also appears that plaintiff in error has entered into covenant before the county judge to teach Edward Reams the art of cooking, and to educate him in the elements of reading, writing, and arithmetic, and to deposit in bank to his credit three dollars per month until he reaches his majority, then to be drawn out on his check, and at that time to give him a new suit of clothes, shoes, blanket, and a sum of money not less than fifty dollars. The boy consents to this arrangement, and is anxious to remain with plaintiff in error. The circumstances of this case, considering the treatment received by Edward Reams as shown by the evidence, his age, his strong aversion to returning to his uncle, and the benefits that promise to accrue to him from his choice in remaining with Dr. Marshall, clearly overcome the mere legal right in Henry Reams derived from the mother, and we think the court was in error in not allowing him to remain where he was.

We do not desire to be understood as denying the right of a parent, or one standing *in loco parentis*, to moderately chastise for correction a child under his or ⁵⁰⁷ her control or authority; but where a child has been committed by its parent to an uncle to raise, and the testimony, uncontradicted, shows that the uncle has inflicted immoderate and cruel punishment on the child to such an extent as to alienate his feelings, and to cause it to desire liberation from the uncle's control, the court should not on *habeas corpus* restore the child to the uncle where it is made to appear that the child has reached the age of intelligent discretion, and has deliberately chosen to remain with a stranger against whom no objection can be made, and who has obligated himself to provide for the child in a manner more favorable than would be its condition with the uncle.

While we think that the court erred on the showing made

here in awarding the custody of Edward Reams to his uncle, it is not to be inferred from what we decide that Marshall is entitled to any coercive control over the boy by virtue of the apprentice proceedings before the county judge. This is a question not determined here, and we do not intimate any approval of the proceedings in the apprenticeship, or adjudicate any rights under them.

Judgment reversed for proceedings not inconsistent with this opinion.

PARENT AND CHILD—CUSTODY OF MINOR—DISCRETION OF COURT—WELFARE OF CHILD.—The court has a discretion in awarding the custody of a minor child, and the welfare of the infant is the pole star by which the discretion of the court is to be guided: *Merrett v. Swimley*, 82 Va. 433; 3 Am. St. Rep. 115; *Green v. Campbell*, 35 W. Va. 698; 29 Am. St. Rep. 843, and note; *Sheare v. Stein*, 75 Wis. 44. The treatment of a child by one not legally entitled to its custody is immaterial if the person entitled to its custody is one fit to be intrusted therewith: *Jones v. Harmon*, 27 Fla. 238. See, for a full discussion of this subject, the extended notes to *Brooks v. Logan*, 2 Am. St. Rep. 183, and *State v. Smith*, 20 Am. Dec. 330.

PARENT AND CHILD—CUSTODY OF CHILD—RIGHT OF CHILD TO CHOOSE. The court, in exercising its discretion in awarding the custody of a minor child, may consult the wishes of the child if it has come to the years of discretion: *Green v. Campbell*, 35 W. Va. 698; 29 Am. St. Rep. 843, and note; *Richards v. Collins*, 45 N. J. Eq. 283; 14 Am. St. Rep. 728, and note; *Merrett v. Swimley*, 82 Va. 433; 3 Am. St. Rep. 115; *In re Gates*, 95 Cal. 461; but the desires of a child four years of age should not be given any effect against the legal right of a proper person who is entitled to her custody: *Jones v. Harmon*, 27 Fla. 238. See a discussion of this question in the notes to *Brooks v. Logan*, 2 Am. St. Rep. 185; *State v. Smith*, 20 Am. Dec. 336; and *Chapley v. Wood*, 40 Am. Rep. 329.

PARENT AND CHILD—RIGHT OF MOTHER TO CUSTODY OF ILLEGITIMATE CHILD.—This question is fully discussed in the extended note to *Brooks v. Logan*, 2 Am. St. Rep. 185.

WESTERN UNION TELEGRAPH CO. v. WILSON.

[22 FLORIDA, 87.]

TELEGRAPH COMPANIES—FAILURE TO DELIVER CIPHER MESSAGE—MEASURE OF DAMAGES.—The liability of a telegraph company for failure to transmit and deliver a message written in unexplained cipher, or in language unintelligible except to those having a key to its hidden meaning, is for nominal damages, or, at most, for the sum paid as the price for its transmission and delivery.

Mallory and Maxwell, for the appellant.

John C. Avery, for the appellee.

⁵²⁷ **TAYLOR, J.** The appellee sued the appellant in the circuit court of Escambia county, in case, for damages for its failure to transmit and deliver a telegraphic message in ⁵²⁸ cipher. The suit resulted in a judgment for the plaintiff in the sum of six hundred and eighty-eight dollars and eighty-eight cents, and therefrom the defendant telegraph company appeals.

The declaration alleges as follows: "That the Western Union Telegraph Company, a corporation, the defendant, on the twelfth day of December, 1887, was engaged in the business of transmitting telegraphic messages between Pensacola, Florida, and New York, in the state of New York, and in the delivery thereof to other cable and telegraph companies for transmission to Liverpool, England, where the said plaintiff had a regular merchant broker or agent, to wit: one A. Dobell, through whom the plaintiff negotiated, by means of such messages, the sale in Europe of cargoes of lumber and timber, the plaintiff being then and there a timber and lumber merchant at the city of Pensacola. That on said day the plaintiff delivered to the defendant, and the defendant received from him at its office in the city of Pensacola, and undertook to transmit and cause to be transmitted, and it was its duty to transmit and cause to be transmitted, to the said A. Dobell, the following cipher message: 'Dobell, Liverpool: Gladfulness—shipment—rosa—bonheur—luciform—banewort—margin,' which the said Dobell would have understood, and the plaintiff intended to be an offer of a cargo of lumber and timber from said port of Pensacola for sale through the said Dobell in Europe, and the said Dobell would have sold the same for the plaintiff on the terms of said offer at a profit to the plaintiff of twelve hundred dollars, but the defendant failed and neglected to send the said message in violation of its duty to the plaintiff, and to the plaintiff's loss of twelve hundred dollars," and therefore he sues, etc.

At the trial the plaintiff, over the defendant's objection, was permitted to testify, in establishment of the ⁵²⁹ damages claimed, that he had to sell his cargo of lumber in Europe upon the market for the best price he could get, which was fifty-two shillings a load, and which amounted to six hundred and thirty dollars and eighty-four cents less than the price at which he offered same for sale in the message failed to be sent.

The overruled objection of the defendant to this testimony

was, that the damage sought to be shown thereby was too remote, and was not in the contemplation of the parties at the time of the alleged making of the contract for the transmission of said message. To this ruling the defendant excepted, and it is assigned as error. The question presented is, what is the proper measure of damages to be recovered of a telegraph company holding itself out to the service of the public for hire as the transmitter of messages by electricity, upon its failure to transmit or deliver a message written in cipher, or in language unintelligible except to those having a key to its hidden meaning. As this question has heretofore been passed upon by this court contrary to the views we find it impossible to become divested of, and, as we think, contrary to the great weight of the well-reasoned adjudications, both in this country and in England, we take it up with diffidence that finds no palliative in the fact that the decision heretofore was by a divided court: *Western Union Tel. Co. v. Hyer*, 22 Fla. 637; 1 Am. St. Rep. 222. In that case the majority of the court, while approving the following well-established rule first formulated in reference to carriers of goods in the *cause celebre* of *Hadley v. Baxendale*, 9 Ex. 341: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may ⁵³⁰ fairly and substantially be considered as arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it," hold that it has no applicability to the contracts of telegraph companies for the transmission of messages, and that such companies may be justly considered and treated as standing alone, a system unto itself. The reasoning leading to this conclusion is as follows: "The common carrier charges different rates of freight for different articles according to their bulk and value and their respective risks of transportation, and provides different methods for the transportation of each. It is not shown here that the defendant company had any scale of prices which were higher or lower as the importance of the dispatch was great or small. It cannot be said, then, that for this reason the operator should be informed of its importance, when it made no difference in the charge of transmission. It is not shown that if its importance had been disclosed

to the operator that he was required by the rules of the company to send the message out of the order in which it came to the office, with reference to other messages awaiting transmission, that he was to use any extra degree of skill, any different method or agency for sending it from the time, the skill used, the agencies employed, or the compensation demanded, for sending an unimportant dispatch, or that it would aid the operator in its transmission. For what reason, then, could he demand information that was in no way whatever to affect his manner of action or impose on him any additional obligation? It could only operate on him persuasively to perform a duty for which he had been paid the price ⁵³¹ he demanded, which in consideration thereof he had agreed to perform, and which the law, in consideration of his promise and the reception of the consideration therefor, had already enjoined on him."

The answer to all this is that the same argument is equally applicable as a reason why the rule in *Hadley v. Baxendale*, 9 Ex. Ch. 341, should not apply to carriers of goods for hire. The carrier of goods, in contracting to carry and deliver, deals with the tangible; when he contracts he has in his mind's eye, from the visible, tangible subject of his contract, what will be the probable damage resulting directly from a breach of it on his part, and so has the other party to the contract with the carrier—therefore the damage likely to flow from a breach by the carrier can properly be said to enter mutually into the contemplation of both parties to the contract, and it is this mutuality in the contemplation of both parties to the contract of the results that will be likely to flow directly from its breach that really furnishes that equitable feature of the rule that the damages thus mutually contemplated are in fact the damages that the law will impose for the breach. Why? Because in the eye of the law, the parties having mutually contemplated such damages in going into such contracts, those damages can alone be inferred as having entered into their contract as a silent element thereof. The rule in *Hadley v. Baxendale*, 9 Ex. Ch. 341, is applicable alone to breaches of contract, and formulates concisely the measure of damages for the breach of those contracts that do not within themselves in express terms fix the penalty to follow their breach. In other words, this rule does nothing more than to give expression to that part of the contract which in the eye of the law has been mutually agreed upon between the dar-

ties, but concerning which their contract itself is silent. This ⁵³³ essential and leading feature of the rule, we think, was wholly lost sight of in the discussion of the question in *Western Union Tel. Co. v. Hyer*, 22 Fla. 637, 1 Am. St. Rep. 222, i. e., that the damages provided for under the rule arise *ex contractu*, and that unless there is mutuality in all the essential elements that enter into or grow out of the contract, the whole fabric becomes unilateral, and abhorrent in the eyes of the law. The assertion as a rule of law that one party to a contract shall alone have knowledge that a breach of that contract will directly result in the loss of thousands of dollars, and that upon such breach he can recover of the other party to the contract all of such, to him, unforeseen, unexpected, un contemplated, nonconsented to damages seems to us to be a complete upheaval of all the old landmarks in reference to damages upon broken contracts, and the establishment of a new rule that is neither fair, just, nor equitable; and which, if it is to be applied to the broken contracts of telegraph companies, must also, according to every principle of consistency, be applied, under like conditions, to every violated contract where individuals are the contracting parties. The argument in *Western Union Tel. Co. v. Hyer*, 22 Fla. 637, 1 Am. St. Rep. 222, that it was not shown that the telegraph company would have charged more, or used more dispatch, or taken more care, or been aided in any way in the performance of its duty if it had been informed of the contents or purport of the message contracted to be sent in that case, is entirely foreign to the question. In arriving at the rule of law as to the damage that parties to contracts are entitled to, as a matter of legal right, upon breach thereof, a consideration of anything that might or might not in fact have prevented the wrongful breach, has nothing to do with the subject whatever. But we are to look to and consider ⁵³³ the mutual rights of the parties from the inception of the contractual relations between them, down through the contract itself to the breach complained of.

One of the primary rights that each party has who is about to enter into a contract with another, a breach of which may result in damage, is to be so situated that he may foresee what direct probable results will reasonably and in the usual course of events follow bad faith, neglect or other breach upon his part. Why? Not that it will or will not in fact deter him from being delinquent, but that he may, if he will, so act as

to guard against and avoid, for his own benefit, the foreseen calamitous consequence, or, that he may, if he does not, be held to have knowingly and willingly subjected himself to the contemplated consequences of his wrong, that, from being foreseen and contemplated, the law will impute his consent thereto.

That the rule formulated in *Hadley v. Bazendale*, 9 Ex. 841, is the one properly applicable to the contracts of telegraph companies for the transmission of messages has the support of the overwhelming weight of the decided cases, not only as to the numerical strength of the decisions concurring therein, but in the logical soundness of the reasoning upon which their conclusions rest, as will be seen from the following authorities: *Western Union Tel. Co. v. Hall*, 124 U. S. 444; *Sanders v. Stuart*, L. R. 1 C. P. D. 326; *Behm v. Western Union Tel. Co.*, 8 Biss. 181; *White v. Western Union Tel. Co.*, 14 Fed. Rep. 710; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165; *Western Union Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 186; *First Nat. Bank v. Telegraph Co.*, 30 Ohio St. 555; 27 Am. Rep. 485; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452; *Daniel v. Western Union Tel. Co.*, 61 Tex. 452; 48 Am. Rep. 305; *Beaupré v. ⁵²⁴ Pacific & Atlantic Tel. Co.*, 21 Minn. 155; *Trus v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156; *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157; *United States Tel. Co., v. Wenger*, 55 Pa. St. 262; 93 Am. Dec. 751; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; *United States Tel. Co. v. Gildersleeve*, 29 Md. 282; 96 Am. Dec. 519; *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217; 18 Am. St. Rep. 37; *Cannon v. Western Union Tel. Co.*, 100 N. C. 300; 6 Am. St. Rep. 590; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. 530; *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; 18 Am. Rep. 8; *Western Union Tel. Co. v. Edsall*, 63 Texas, 668; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558; 14 Am. Rep. 775; *Thompson v. Western Union Tel. Co.*, 64 Wis. 531; 54 Am. Rep. 644; *Abeles v. Western Union Tel. Co.*, 37 Mo. App. 554; *Western Union Tel. Co. v. Cornwell*, 2 Col. App. 491; 3 Sutherland on Damages, 298; Wood's Mayne on Damages, 40; Thompson's Law of Electricity, sections 311 to 316 inclusive, and sections 346 and 358 to 375 inclusive. Opposed to this array of authorities are the following decisions by divided courts, with the exception of the Georgia and Mississippi cases: *Western Union Tel. Co. v. Hyer*, 22 Fla. 631; 1 Am. St. Rep. 222; *Daughtery*

v. American Union Tel. Co., 75 Ala. 188; 51 Am. Rep. 435; *American Union Tel. Co. v. Daughtery*, 89 Ala. 191; *Western Union Tel. Co. v. Way*, 83 Ala. 542; *Western Union Tel. Co. v. Fatman*, 73 Ga. 285; 54 Am. Rep. 877; *Alexander v. Western Union Tel. Co.*, 66 Miss. 161; 14 Am. St. Rep. 556. The case of *Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715, is also cited as sustaining a contrary rule, but a careful reading of that case will disclose the fact that the conclusions reached are predicated upon a statutory provision in their code. In the case at bar the message that it is alleged the defendant company failed to send was in cipher and contained nothing that would indicate to the defendant's operator whether it contained a criticism upon the "Horse Fair" painting by the great artist Rosa Bonheur named in the message, or whether it related to a matter of dollars and cents. There was ⁵³⁵ no explanation made to the operator as to its meaning or importance, except that the plaintiff said that the word "gladfulness" in the message had a special meaning. What that special meaning was he did not disclose. Under these circumstances all that the plaintiff could rightfully recover for the defendant's failure to send or deliver the message would be nominal damages, or, at most, the sum paid by him as the price of its transmission. It was error, therefore, for the court to admit testimony as to the damage sustained by the plaintiff by the loss of sale of a cargo of timber consequent upon the failure to forward the message.

There is another feature presented in the proofs, aside from all that has been said upon the rule of damages in such cases, that would prevent the recovery had in this case. The plaintiff himself testifies that he received from his agent Dobell in Europe an offer for the cargo of timber. What that offer was is nowhere stated or shown. Then he says: "I decided to make a final proposition, which I did by taking the message to the telegraph office that was not sent, which message when translated was an offer by me of said cargo of timber for sale at fifty-four shillings per load." Then he says that he missed the sale of the cargo at the terms offered by him in his message in consequence of the defendant's failure to send it, and, consequently, had to sell on the market for the best price he could get, which was fifty-two shillings per load. There is not a word of proof in the record to show that his offer contained in the unsent message would ever have been accepted, or that he could ever at any time have sold the timber at the

price at which he so offered it, or that it could ever have been sold at any greater price than the one he actually received for same, whether his message had been sent or not. Yet in the ⁵³⁶ face of this state of the proofs damages have been allowed to the plaintiff equal to the difference between a price at which he simply offered his timber for sale, and the price actually received by him for it, without a word of proof to show whether the higher price at which he offered it for sale could ever have been obtained for it or not.

The appellee contends that because of the decision in *Western Union Tel. Co. v. Hyer*, 22 Fla. 637; 1 Am. St. Rep. 222, the question of damages cannot be considered, that, as to this case, it is *stare decisis*. This doctrine, as we understand it, is properly applicable to decisions furnishing rules of property, and those construing statutes, and to those passing upon the validity of contracts in which investments have or may have been made upon the faith of the adjudication as to their validity, in which cases former decisions upon the same questions will be adhered to, but we do not think this case falls within the rule.

In reversing the former ruling of the court in *Western Union Tel. Co. v. Hyer*, 22 Fla. 637, 1 Am. St. Rep. 222, we do not interfere with any vested right, acquired upon the faith of that adjudication, but pass upon the rule of damages, as upon an abstract proposition, to follow the breach of such contracts. Of the erroneousness of the rule as laid down in that case, we are perfectly and clearly satisfied; and, in such case, in determining the propriety of overruling it as a solemn adjudication, we are to be governed largely by a consideration of the results that will likely flow from the enunciation and establishment of the one or the other of the two rules. If, in such case, we conclude that the affirmance of what we deem to be the erroneous rule in that case will be productive of more far-reaching and harmful results than would follow the disaffirmance thereof, then it becomes our duty to overturn ⁵³⁷ it. And such we think would be the result here. Besides being unilateral and wholly unfair, as we have before stated, we can not see why, if the protection of the rule in *Hadley v. Bazendale*, 9 Ex. 841, is to be withheld from contracts with telegraph companies, it should not also be denied in the daily recurring contractual controversies between individuals. To overturn the rule in controversies as between man and man would be such an uprooting of the old landmarks as to make

it impracticable to surmise the harmful results that would follow. Entertaining these views, we do not think that the doctrine of *stare decisis* constrains us to adhere to the rule in *Western Union Tel. Co. v. Hyer*, 22 Fla. 687; 1 Am. St. Rep. 222, but think that less harm will follow our return to the well-beaten and familiar track, that furnishes a plain and easily comprehended rule for all contracting parties, be they corporate or individual.

The judgment appealed from is reversed, and a new trial ordered.

RANNEY, C. J. A reconsideration of the question of the measure of damages involved here confirms the correctness of the views expressed in my dissenting opinion in *Western Union Tel. Co. v. Hyer*, 22 Fla. 649 et seq., 1 Am. St. Rep. 222, and I concur in the opinion of Judge Taylor, that the rule followed in the case mentioned is unfair and ought not to be perpetuated; and, without committing myself further upon the question of *stare decisis*, my conclusion is that more injury will result in the future from adhering to the rule of the *Hyer* case than will accrue to parties to past transactions from changing it, and that the judgment should be reversed. Cooley's ⁵³⁸ Constitutional Limitations, 5th ed., 65, and note 1; Wells on *Stare Decisis*, section 624 et seq.; Chamberlain on *Stare Decisis*, 19.

MABRY, J. The question of liability to damage for a failure on the part of a telegraph company to send a cipher message is not a new one in this court. Over six years ago this question was deliberately settled here by the decision in the case of *Western Union Tel. Co. v. Hyer*, 22 Fla. 687; 1 Am. St. Rep. 222. It is proposed now to reverse this case, and my view is that it should not be done. Every question in reference to cipher messages entering into the case now before us was fully discussed and maturely considered in the *Hyer* case, and this case has the support of decisions in Alabama, Mississippi, Georgia, and Virginia. Under the decision in the *Hyer* case there was a remedy for damages for a failure on the part of a telegraph company to send a cipher message when it had for compensation agreed to do so. There is much merit in the rule that where the company holds itself out to the public as a transmitter of cipher messages for pay, it should not be allowed, after receiving the money and agreeing to send the message, to deny its liability for damages result-

ing from its own violation of duty, on the ground that the message was in cipher and its contents not known to the company when it agreed to send it. This court having planted itself in favor of this rule over six years ago I do not think we should now disturb it. I do not see how greater harm will result from adhering to the decision than overruling it.

TELEGRAPH COMPANIES—LIABILITY WITH REGARD TO CIPHER MESSAGES: See the extended notes to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 786; *Western Union Tel. Co. v. Hyer*, 1 Am. St. Rep. 228; *Western Union Tel. Co. v. Reynolds*, 48 Am. Rep. 731, and *Camp v. Western Union Tel. Co.*, 71 Am. Dec. 472.

When a telegraphic message is in cipher and the defendants are entirely ignorant of its purport the company is liable only for the amount received for its transmission where it is delayed through the company's negligence: *Oandes v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452. For a failure to deliver or delay in delivering a cipher message the company is liable for nominal damages: *Daniel v. Western Union Tel. Co.*, 61 Tex. 452; 48 Am. Rep. 305. A telegraph company is not liable for loss consequent upon its failure to deliver a message in cipher, or which does not indicate on its face that such loss might result: *United States Tel. Co. v. Gildersleeve*, 29 Md. 232; 96 Am. Dec. 519; *Cannon v. Western Union Tel. Co.*, 100 N. C. 300; 6 Am. St. Rep. 590. The contrary doctrine is upheld in the following cases: *Western Union Tel. Co. v. Hyer*, 22 Fla. 637; 1 Am. St. Rep. 222; *Western Union Tel. Co. v. Fatman*, 73 Ga. 285; 54 Am. Rep. 877; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; 46 Am. Rep. 715; *Daugherty v. American Union Tel. Co.*, 75 Ala. 168; 51 Am. Rep. 435. For a further discussion of this subject examine the numerous cases in this series cited in the opinion to the leading case.

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

DUCKER v. BURNHAM.

[146 ILLINOIS, 9.]

WILLS—**EQUITABLE CONVERSION DOES NOT OCCUR UNLESS** there is an imperative direction in the will that land shall be converted into money or money into land. Hence, if the will merely confers upon a designated life tenant the power of disposing of any or all the estate, both real and personal, and the intention of the testator, as gathered from the language of the whole instrument, appears to have been to leave it to the discretion of such life tenant whether that power shall be exercised, there is no conversion consummated in law until the power conferred has been actually exercised.

ESTATES—**REMAINDER LIMITED UPON ESTATE FOR LIFE WITH POWER OF SALE**.—A power of sale added to a life estate does not raise the estate to a fee. Hence, although a will creates a life estate, with power to sell and convey the fee, it may at the same time limit a remainder after the termination of the life estate.

ESTATES—**VESTED AND CONTINGENT REMAINDERS**.—A remainder limited upon a life estate with a power of sale added is not made contingent by the fact of its being uncertain whether such power will be actually exercised or not.

POWERS DISTINGUISHED FROM RIGHTS OF PROPERTY.—A power of disposition does not imply ownership, but is a mere authority conferred by the instrument creating it.

ESTATES—**REMAINDER, WHEN NOT CONTINGENT**.—A remainder limited upon a life estate, with a power of sale added, is not made contingent by uncertainty as to the amount of the estate which will be left undisposed of at the expiration of the life estate, but by uncertainty as to the persons who are to take such remainder.

ESTATES—**VESTED AND CONTINGENT REMAINDERS DISTINGUISHED**.—A vested remainder, whereby a vested interest passes to the remainderman, though to be enjoyed *in futuro*, is, where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. A contingent remainder, whereby no present interest passes, is where

the estate in remainder is limited to take effect either to a dubious or uncertain person, or upon a dubious and uncertain event.

LEGACIES, WHEN VESTED AND WHEN CONTINGENT.—A legacy is of the vested kind if the time of payment merely is postponed, and it appears to be the intention of the testator that his bounty should immediately attach; but if the time be annexed to the substance of the gift as a condition precedent, it is contingent, and not transmissible.

ESTATE UPON CONDITION SUBSEQUENT, WHEN VESTS.—An estate limited upon a contingency, to which the effect of a condition subsequent is given, vests at once, subject to be divested upon the happening of the contingency. Whether the condition is really precedent or subsequent depends upon whether it is incorporated into the gift to or description of the remainderman, or is added as a separate clause after words which have already given a vested interest.

LEGACY UPON CONDITION, HOW CONSTRUED.—Where it is doubtful whether words of condition or contingency apply to the gift itself or to the time of payment, they will be construed as applying to the latter.

WILLS, CONSTRUCTION OF.—THE INTENTION OF THE TESTATOR MUST CONTROL in the interpretation of a will, and, in order to ascertain what that intention is, the whole will and all its parts must be considered.

WILLS, CONSTRUCTION OF.—PRESUMPTION IN FAVOR OF VESTING OF ESTATES.—The law favors the vesting of estates, and, if possible, construes the terms of a will as creating a vested estate.

LEGACIES, WHEN VESTED OR CONTINGENT.—The general rule is that where there is no gift but by a direction to divide, or transfer, or pay, from and after a given event, the vesting must be postponed until after the event has happened, unless from particular circumstances a contrary intention is to be collected, or unless the payment, distribution, or division is postponed merely for the convenience of the fund or property, as, for instance, to let in a prior gift for life to another.

WILLS—REMAINDER, WHETHER VESTED OR CONTINGENT.—INTENTION OF TESTATOR.—Whether limitation creates a vested or contingent remainder may depend upon the intent of the testator, as well as upon the condition of its taking effect. When the devise is to the testator's wife for life, and at her death to such of his children as shall then be living, the benefit does not purport to be conferred on the children as children or individuals named, but as survivors, and this indicates that an immediate vesting is not intended. But where the devise is to the wife for life, with remainder to certain named children, and with a subsequent provision that if any of such named children die before the wife, then the property is to be equally divided between the survivors, the devise of the remainder is to certain definitely specified individuals, who, as remaindermen, already answer the description by which they are to take, and there is no obstacle to supposing an immediate vesting to have been intended.

THE defendants in error levied attachments upon "all the right, title, and interest of John J. Ducker" in certain real estate. The appellants, Jennet Ducker and George A. Ducker, who were executors of the will of James Ducker and beneficiaries thereunder, were allowed to file interpleaders in the attachment suits, averring that the only interest which John

J. Ducker had in the property attached, if any, was acquired through the will of James Ducker; that he had no existing interest thereunder subject to levy; and that the two thousand dollars bequeathed to the said John J. Ducker, by the third clause of the will set out below, was paid to him before the attachment writs were issued. The plaintiffs demurred to the interpleaders, and, the demurrers being sustained, the court dismissed the interpleaders and rendered judgments in the attachment suits against John J. Ducker. Writs of error having been sued out in the supreme court to review these judgments, the attachment suits were consolidated by agreement and heard together. The will of James Ducker was as follows:

"I, James Ducker, of Joliet, Ill., being of sound mind and memory, do hereby make, publish, and declare this my last will and testament.

"1. I hereby revoke all former wills by me made.

"2. I direct the payment of all my just debts.

"3. I give and bequeath to my five children, James W. Ducker, Maria J. Ducker, George A. Ducker, John J. Ducker, and Jessie M. Ducker, the sum of two thousand dollars (\$2,000) each, to be paid to them within two years after my death, as my executors may be able conveniently to raise the same out of my estate without sacrificing any part thereof.

"4. I give, bequeath, and devise to my wife, Jennet Ducker, the use of all the rest of my real and personal estate for and during her natural life, and I hereby give her full power and authority to sell, dispose of, and convey any and all of said real and personal estate, and to invest the proceeds thereof in any other form she deems advisable, and I give her full right and authority to use and exhaust such part of the principal of my estate, real and personal, as she may at any time think necessary for her support and maintenance. This paragraph shall include my store in Joliet and the stock of goods therein, and the goodwill of the business, and I direct that said store and contents be delivered to her immediately after my death, and she may continue said business or dispose of the same, as she thinks best. But this entire paragraph is subject to the charge of raising out of the property left by me the sums required to meet the second and third paragraphs of this will, which shall be done by my executors out of such property, and in such manner as they deem for the best interest of my estate.

"5. After the death of my wife I direct that all my property and estate then remaining, both real and personal, be by my surviving executor equally divided between my said five children, share and share alike.

"6. In case of the death of any of my said children without issue, either before my death or before receiving either of the portions above given him or her, I direct that the share of such child be equally divided among my surviving children, share and share alike.

"I hereby appoint my wife, Jennet Ducker, and my son, George A. Ducker, the executors of this will, and request that no security be required of them upon their bond as such executors. I hereby empower my said executors to sell and convey any of my real and personal estate which they may deem it necessary or advisable to dispose of in order to raise the funds needed to comply with the requirements of the second and third paragraphs of this will."

Hill, Haven, and Hill, for the plaintiffs in error.

Donahoe and McNaughten, for the defendants in error.

17 MAGRUDER, J. The question is, whether the will gave John J. Ducker such an interest in the property of the testator as was subject to levy before the death of the widow. Under the will, Mrs. Ducker took an estate as tenant for life, with remainder over to the five children of the testator, of whom John J. Ducker is one. Is that remainder vested or contingent? If it is vested, it is subject to levy; if it is contingent, it is not subject to levy: 2 Freeman on Judgments, 4th ed., sec. 354.

It is contended by counsel for appellants, that the remainder is contingent for two reasons: 1. Because it is dependent upon the uncertain event that some part of the estate shall remain undisposed of and unexhausted at the death of the life tenant. 2. Because it is dependent upon the uncertain event, that John J. Ducker shall be alive when the particular estate is terminated by the death of the life tenant.

The first reason is based upon the use of the words "then remaining" in the fifth clause of the will, considered in connection with the fourth clause thereof. The latter clause confers upon the life tenant the power of disposing of any and all of the estate both real and personal. While, however, the ¹⁸ power to sell and dispose of the estate is granted, there is no imperative direction that the land shall be converted into

money, or the money into land. On the contrary, the intention of the testator, as gathered from the language of the two clauses, would appear to have been to leave it to the discretion or option of the life tenant whether she should exercise the power or not. By the fourth clause she is empowered, either to continue the business in the store in Joliet, or to sell the store and the stock therein and the goodwill of the business, as she thinks best; and she is to use only such part of the principal of the estate as she may think necessary for her support and maintenance. The fact, that, by the terms of the fifth clause, a provision is made for the division of such part of the "property and estate" as should remain at the death of the life tenant, shows that the testator did not intend an absolute conversion of all his estate into personalty. Hence, an equitable conversion, which has been defined to be "the notional alteration of land into money, or money into land, in accordance with a direction to that effect of a testator or settler, and in pursuance of the equitable doctrine that what is agreed or imperatively directed to be done is already done, or as good as done," does not arise out of the provisions of the present will. Where the conversion depends on the will or discretion of the executor it will not be regarded as consummated in law until it is consummated in fact: 6 Am. & Eng. Ency. of Law, pages 664, 665, and cases cited in notes.

A power of sale added to a life estate does not raise the estate to a fee: *Walker v. Pritchard*, 121 Ill. 221; 1 Jarman on Wills, Bigelow's 6th ed., p. 378, and notes; *Burleigh v. Clough*, 52 N. H. 267; 13 Am. Rep. 23. Although a will creates a life estate with power to sell and convey the fee, it may at the same time limit a remainder after the termination of the life estate: *Walker v. Pritchard*, 121 Ill. 221. Whether such remainder is vested or contingent is not affected by the power of sale conferred by the will either on the life tenant or on the executor. ¹⁰ If the power is so exercised as to dispose of all the estate, nothing may be left to go to the remainderman, but the remainder is not made contingent because it is uncertain whether the power will be exercised. The remainder may vest subject to the power. There is a distinction between a power and a right of property. A power of disposition does not imply ownership, but is a mere authority conferred by the will: *Burleigh v. Clough*, 52 N. H. 267; 13 Am. Rep. 23. "A limitation, after a power of appointment, as, to the use of A for life, remainder to such use as A shall appoint, and in de-

fault of appointment, remainder to B, is a vested remainder, though liable to be divested by the execution of the power": 4 Kent's Commentaries, page 204.

In *Railsback v. Lovejoy*, 116 Ill. 442, where a testator devised land to his widow for life, with remainder to his seven children, and gave the executor power to sell the land with the concurrence of the widow, and where the interest of one of the remaindermen was levied on and sold and conveyed by the sheriff during the lifetime of the widow, we held that the devisees took a vested estate in remainder subject to the power of sale, and that the rights of the devisee, whose interest was levied on, passed to the purchaser at the sheriff's sale, and it was there said: "It is further contended by appellants, that, by reason of the power of sale in the will, . . . the children . . . had a contingent remainder only, and that consequently nothing passed by the sheriff's deed. This view is clearly unsound. The power had nothing to do with the vesting of the estate. It is obvious the estate vested in the children upon the testator's death, subject to the power." The *Railsback* case was subsequently referred to upon this point and approved in *Scofield v. Olcott*, 120 Ill. 362.

It is said, that it cannot be determined what part of the estate will remain undisposed of at the death of the widow, and that, therefore, there can be no vesting of the remainder until that time. The words, "then remaining," as used in the ²⁰ fifth clause, can as well apply to what remains after the payment of the debts and bequests named in the second and third clauses, as to what may remain after the exercise of the powers conferred upon the life tenant in the fourth clause. By the latter clause the payment of the debts and the gifts of ten thousand dollars to the children are required to be raised out of the property, and are made a charge thereon. If the remainder is contingent because it may consist of what remains after the exercise of the powers of sale and use conferred upon the life tenant, then, in case the life tenant should fail to sell any of the estate or to exhaust for her own use any of the principal thereof, the remainder would still be contingent, because it would consist of what remains after paying off the charges created upon the property by the directions to pay the debts and the bequests. To hold that a remainder is contingent, because it cannot be known how much will be left until the debts and funeral expenses and other charges are paid, would make every remainder given

by will a contingent one. But it is well settled, that a devise to a person after the the payment of debts and legacies is not contingent until such debts and legacies are paid, but confers an immediately vested interest: *Scofield v. Olcott*, 120 Ill. 362. In such cases the remainder vests subject to the payment of debts and legacies and subject to the exercise of the power to use and sell, but liable to be divested as to so much of the estate as may be disposed of for the payment of debts and legacies and by the execution of the power.

The remainder is not made contingent by uncertainty as to the amount of the estate remaining undisposed of at the expiration of the life estate, but by uncertainty as to the persons who are to take: *Heilman v. Heilman*, 129 Ind. 59.

In *Burleigh v. Clough*, 62 N. H. 267, 13 Am. Rep. 23, the will, after giving all the estate, real and personal, to the wife "to her use and disposal during her natural life," contained these words: "And what is remaining at her decease undisposed of by her, I give, devise ²¹ and bequeath unto Joshua E. Dennis and his heirs and assigns forever"; it was held, that the wife of the testator took an estate for life with power to defeat the remainder over, and that Dennis took a vested remainder: See also *Ackerman v. Gorton*, 67 N. Y. 63; *Green v. Hewitt*, 97 Ill. 113; 37 Am. Rep. 102; *Walker v. Pritchard*, 121 Ill. 221; *Heilman v. Heilman*, 129 Ind. 59; *Blanchard v. Blanchard*, 1 Allen, 223; *Leggett v. Firth*, 132 N. Y. 7; *Mitchell v. Knapp*, 8 N. Y. Supp. 40; *Chandler v. Dinkle*, 4 Watts, 143.

In support of their position upon this branch of the case, counsel for appellant rely upon certain decisions in Massachusetts and Georgia. These decisions, however, do not conclusively establish the doctrine, that a grant in the will of power to the life tenant to sell, or use, all, or a part of, the estate creates such a contingency as to the existence of any remainder, or as to the *quantum* of the remainder, that the vesting will be postponed until the termination of the life estate. In *Bamforth v. Bamforth*, 123 Mass. 280, a devise over to two parties was held to be contingent, because of the use of the words, "should either of them be living," but uncertainty as to the amount of the estate was not given as a reason for not vesting. The case of *Johnson v. Battelle*, 125 Mass. 453, merely relates to the power of the life tenant to convey. In *Taft v. Taft*, 130 Mass. 461, a bill was filed by the remaindermen against the life tenant to enjoin her from selling the real

estate, and it was held, that the lower court properly sustained a demurrer to the bill and dismissed it, because the life tenant had power to sell or dispose of the estate by will. The question was, whether the life tenant was acting within her power, and not whether the remainder was contingent or vested; and, therefore, the remark, that the gift of the remainder to the plaintiffs was contingent upon the event, that some estate remained at the death of the defendant not disposed of by her will, was unnecessary to the decision. These Massachusetts cases are reviewed and criticised in *Mitchell v. Knapp*, 8 N. Y. Supp. 40, and held not to sustain the proposition, that uncertainty as to the amount of the estate devised over makes the remainder contingent. The weight of authority is against the proposition: *Welsh v. Woodbury*, 144 Mass. 542. In the case of *Darnell v. Barton*, 75 Ga. 377, the interest of one of the parties in the remainder was contingent upon his surviving the life tenant, irrespective of the uncertainty in the *quantum* of the remainder.

We are of the opinion, that the remainder in the case at bar is not contingent for the first of the two reasons above stated.

The second reason given, why the remainder should be regarded as contingent, is its alleged dependence upon the uncertainty of the survivorship of John J. Ducker at the time of the termination of the particular estate by the death of the life tenant. It is well settled, that, in the interpretation of wills, the intention of the testator must control, and that the whole will and all its parts must be considered in order to ascertain what that intention is. It is also well settled that the law favors the vesting of estates, and will construe the terms of a will as creating a vested estate if possible: *Scofield v. Olcott*, 120 Ill. 362; *Kellett v. Shepard*, 139 Ill. 433. A vested remainder, whereby a vested interest passes to the party, though to be enjoyed *in futuro*, is where the estate is invariably fixed, to remain to a determinate person after the particular estate is spent. A contingent remainder, whereby no present interest passes, is where the estate in remainder is limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event: 2 Blackstone's Commentaries, 168, 169. If the time of payment merely be postponed, and it appear to be the intention of the testator that his bounty should immediately attach, the legacy is of the vested kind; but if the time be annexed to the substance

of the gift as a condition precedent, it is contingent and not transmissible: 2 Redfern on Wills, p. 248. The law presumes, that ²³ words of postponement relate to the enjoyment of the remainder rather than to the vesting thereof, and the intent to postpone the vesting of the estate must be clear and manifest: *Heilman v. Heilman*, 129 Ind. 59. An estate limited upon a contingency, to which the effect of a condition subsequent is given, vests at once, subject to be divested upon the happening of the contingency. Whether the condition is really precedent or subsequent will depend upon whether it is incorporated into the gift to, or description of, the remainderman, or is added as a separate clause after words which have already given a vested interest: *Lenz v. Prescott*, 144 Mass. 505; *Blanchard v. Blanchard*, 1 Allen, 223; *Collins v. Collins*, 40 Ohio St. 353; *Jeffers v. Lampson*, 10 Ohio St. 101; 20 Am. & Eng. Ency. of Law, p. 950. Where it is doubtful whether words of contingency or condition apply to the gift itself, or to the time of payment, they will be construed as applying to the latter: *Eldridge v. Eldridge*, 9 Cush. 516; 2 Redfern on Wills, p. 248.

An application of these definitions to the construction of the present will does not show clearly that it was the intention of the testator to postpone the vesting of the remainder. It will be observed that the sixth (6th) clause does not provide for a division among the surviving children of all the remaining property and estate, but only for a division of the share of any child dying without issue. The words "either of the portions," as used in the sixth clause, not only refer to the gifts named in the third clause, but also to the portions to be set off by the division which is directed to be made in the fifth clause. This being so, each child is referred to as "receiving" the portion "above given him," in the fifth clause. The surviving children were to take the share of the deceased child, if he should die before "receiving" what had already been "above given him." There is thus a distinct recognition of the fact that the share of each child, as specified in the fifth clause, had been given to him before the division at the termination ²⁴ of the life estate should take place. The language of clause six imports that each child had a share before the period of its division should arrive, and that although the time of its enjoyment was postponed, it had theretofore vested, subject to being divested upon his death without issue.

This disposes of the objection that clause five contains no language of gift to the children, but simply a direction to divide the estate after the death of the widow. It is a rule laid down in many of the cases that where there is no gift but by a direction to divide, or transfer, or pay, from and after a given event, the vesting must be postponed until after that event has happened, unless from particular circumstances a contrary intention is to be collected: 2 Redfern on Wills, page 236. But it cannot be said that here the testator intended the period of distribution to be not simply the time fixed for the enjoyment of the possession, but also for the vesting of the estate, because in the sixth clause he himself characterizes the fifth clause as being a gift of the portions therein referred to. The fifth clause, when construed in connection with the sixth, is the same as though it had read: After the death of my wife I give all my property, etc., to be equally divided, etc. It is a well-known exception to the rule above referred to, that where the payment, distribution, or division is postponed for the convenience of the fund or property, as, for instance, to let in a prior gift for life to another, the estate will be vested, and not contingent: *Scofield v. Olcott*, 120 Ill. 362; 2 Redfern on Wills, page 237, par. 37; *Heilman v. Heilman*, 129 Ind. 59. The present case comes within this exception. As we gather the purpose of the testator from his will, he intended to give all his property to his five children, and, after making the specific legacies, he carved out of the remainder a life estate for the support and maintenance of his widow; that is to say the enjoyment of the remainder by the children was simply postponed to let in the life estate.

²⁵ If the effect of the sixth clause is to limit the remainder to such of the children named as should survive their mother, then the remainder is unquestionably contingent. But there are here no words or phrases of contingency which can be said to constitute a condition precedent, such as "if they shall be living at her death," or "to such of them as shall be living." Under the construction already given to the fifth and sixth clauses there is a direct gift of all the property after the life estate previously carved out. The devise is not made upon the contingency of survivorship; but in the fifth clause, as interpreted by the application thereto of the testator's words, "the portions above given him or her," the devise is made to the devisees by name, and the condition appears

only in a subsequent clause, and after words which have already given a vested interest. The devise is in fee to the five children, subject to be divested upon a condition subsequent, and therefore they took a vested remainder. It is manifest that the words "my surviving children," as used in the sixth clause, may refer to several periods of survivorship. They may refer to the children surviving at the death of the testator, or at the death of the child dying without issue, or at the time of the payment of the bequests named in the third clause, or at the death of the widow. If, however, they are regarded as referring—in the case of John J. Ducker, who is alive, and is conceded to have received the bequest made to him in the third clause—to the death of the life tenant, the devise to him was of a vested remainder, defeasible on a condition subsequent.

The provisions of James Ducker's will, as thus construed, present the instance of an estate in remainder, subject to a subsequent, and not a precedent, contingency or condition. Such an estate vests immediately, subject to be defeated by the happening of the condition. The present case is thus brought directly within the doctrine laid down in *Blanchard* ²² v. *Blanchard*, 1 Allen, 223, and approved by this court in the recent case of *Haward v. Peavey*, 128 Ill. 430; 15 Am. St. Rep. 120.

Whether a limitation creates a vested or contingent remainder may depend upon the intent of the testator, as well as upon the conditions of its taking effect. Where the devise is to the testator's wife for life, and at her death to such of his children as shall then be living, the benefit does not purport to be conferred on the children as children, or individuals named, but as survivors, which indicates that an immediate vesting is not intended. But where the devise is to the wife for life, with remainder to certain-named children, and with a subsequent provision that if any of such named children die before the wife, then the property is to be equally divided between the survivors, the devise of the remainder is to certain definitely specified and named individuals, who, as remaindermen, already answer to the description by which they are to take, "and there is no obstacle to supposing an immediate vesting to have been intended": 4 Kent's Commentaries, 13th ed., p. 203, n. 1, and cases cited.

We are consequently of the opinion that the remainder is not contingent for the second reason presented by counsel.

As John J. Ducker must be regarded, in the light of the views here expressed, as having taken a vested remainder under his father's will, his interest in the land attached was subject to levy.

The judgments of the circuit and county courts are accordingly affirmed.

Judgment affirmed.

WILLS—EQUITABLE CONVERSION, WHEN OCCURS.—That a direction to sell will not produce a conversion unless it is positive and explicit, irrespective of all contingencies, and independent of all discretion, see extended note to *Ford v. Ford*, 5 Am. St. Rep. 143, 144, and cases there cited. Hence there is no conversion if the executor is directed to sell land devised for the use of the testator's widow, in case she should so desire: *Estate of Samuel Machemer*, 140 Pa. St. 544; nor if it is provided that the devisees may sell the land at any time after the testator's death, "provided they mutually agree to the time of the sale": *Greenough v. Small*, 137 Pa. St. 132. On the other hand, a will containing a direction to sell land at a time certain works a conversion thereof, notwithstanding a subsequent provision authorizes the widow to postpone the sale, upon terms, as long as she may see cause or during widowhood: *Mellon v. Reed*, 123 Pa. St. 1. A mere power contained in a will to sell real estate does not operate as a conversion of it into personalty: *In re Bingham*, 127 N. Y. 296; unless such power is coupled with a direction or command to sell: *Fahnestock v. Fahnestock*, 152 Pa. St. 56; 34 Am. St. Rep. 623; or the power has been actually exercised: *Clift v. Moses*, 116 N. Y. 144; *McCullough v. Anderson*, 90 Ky. 123.

DEVISES—REMAINDERS, WHEN VESTED AND WHEN CONTINGENT.—A devisee who has capacity to take, at the death of the testator, whenever the possession becomes vacant, and is only withheld from possession by the temporary right of enjoyment in another, has a vested transmissible interest: *Bentley v. Long*, 1 Strob. Eq. 43; 47 Am. Dec. 523. Compare the recent cases, *Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365; *Schuyler v. Hanna*, 31 Neb. 307; *Rodney v. Landau*, 104 Mo. 251; *Doe d. Wright v. Gooden*, 6 Houst. 397; *Kellett v. Shepard*, 139 Ill. 433; *Siddons v. Cockrell*, 131 Ill. 653; *Schaeffer v. Schaeffer*, 141 Ill. 337; *Bunting v. Speck*, 41 Kan. 424; *L'Etourneau v. Henquenet*, 89 Mich. 428; 28 Am. St. Rep. 310. A remainder is contingent if the persons who are to take are not *in esse* or are not definitely ascertained. Among contingent remainders are those in which the title and possession are postponed until the happening of some uncertain event, or when it is to vest upon an event certain in dubious persons, or uncertain persons: *Bates v. Gillett*, 132 Ill. 287. Compare the recent cases, *Long v. Timms*, 107 Mo. 512; *Kingman v. Harmon*, 131 Ill. 171; *Walton v. Follansbee*, 131 Ill. 147; *Stump v. Findlay*, 2 Rawle, 168; 19 Am. Dec. 632; *Matter of Ryder*, 11 Paige, 185; 42 Am. Dec. 109; *Craig v. Warner*, 5 Mack. 460; 60 Am. Rep. 381; *Coggin's Appeal*, 124 Pa. St. 10; 10 Am. St. Rep. 565; *L'Etourneau v. Henquenet*, 89 Mich. 428; 28 Am. St. Rep. 310; *Roundtree v. Roundtree*, 26 S. C. 450. The fact that a power is given to executors or trustees to sell the land during the continuance of the life estate does not make the remainder expectant on the termination of that life estate a contingent one: *Neely v. Boyce*, 128 Ind. 1; *Dickson v. Ogden*, 89 Ky. 162.

WILLS—INTENTION OF TESTATOR TO BE GATHERED FROM ENTIRE WILL.—The latest cases in this series illustrating this rule are *L'Etourneau v. Hen-*

quæret, 89 Mich. 426; 28 Am. St. Rep. 310; *Dickson v. Dickson*, 138 Ill. 541; 32 Am. St. Rep. 163. See also to the same point, *Dean v. Winton*, 150 Pa. St. 227; *Rogers v. Rogers*, 49 N. J. Eq. 98; *Rickner v. Kessler*, 138 Ill. 636; *Ebey v. Adams*, 135 Ill. 80; *Small v. Field*, 102 Mo. 104.

LEGACIES—WHEN VESTED AND WHEN CONTINGENT.—See generally note to *Goebel v. Wolf*, 10 Am. St. Rep. 471. Besides the authorities there cited, the following late cases sustain the principle that, when a legacy is given to a person to be paid at a future time, it vests immediately, but when it is not given until a certain future time, or when the time is annexed, not to the payment only, but to the gift itself, it does not vest until that time: *Estate of Rogers*, 94 Cal. 526; *Ebey v. Adams*, 135 Ill. 80; *Neilson v. Bishop*, 45 N. J. Eq. 473; *Sellers v. Reed*, 88 Va. 377.

LEGACIES, VESTING OF, FAVORED BY THE LAW.—See note to *Goebel v. Wolf*, 10 Am. St. Rep. 472, 473, and the following recent cases: *Kellett v. Shepard*, 139 Ill. 433; *Schaeffer v. Schaeffer*, 141 Ill. 337; *Neilson v. Bishop*, 45 N. J. Eq. 473; *Bunting v. Speck*, 41 Kan. 424. But the question is, after all, one of intent, and this, if apparent, will override the usual rule that, where there is no gift except by way of a direction to the executor or trustee to pay at a future time, the property will not vest till that time: *Bowditch v. Agnew*, 138 N. Y. 222.

EXECUTION, REMAINDER, IF VESTED—SUBJECT TO SALE ON.—*Harrison v. Maxwell*, 2 Nott & McC., 347; 10 Am. Dec. 611; *Blanton v. Morrow*, 7 Ired. Eq. 47; 53 Am. Dec. 391; *Dickson v. Ogden*, 89 Ky. 162.

GITCHELL v. PEOPLE.

[146 ILLINOIS, 175.]

INDICTMENT, WHEN NOT IMPRACHABLE BY AFFIDAVITS OF GRAND JURORS.

The affidavits of grand jurors cannot be received for the purpose of showing that twelve of their number did not concur in finding a true bill against the accused.

INDICTMENT—FOREMAN'S INDORSEMENT OF TRUE BILL, CONCLUSIVENESS

OF, AS EVIDENCE.—Where a statute expressly provides that an indorsement of a true bill upon an indictment by the foreman of a grand jury shall be evidence, that it has been found by twelve of the jurors, an indictment, when returned into court, with such indorsement properly made, becomes a judicial record, importing all the legal verity which belongs to that species of evidence, and cannot be impeached by the testimony of the members of the very body who, in the presence of their foreman, stood by in silence and saw him hand it to the court.

INDICTMENT, OBJECTION TO VALIDITY OF, WHEN MUST BE TAKEN.—As a general rule, a defendant who pleads to an indictment is deemed to admit its genuineness as a record, and, after he has been convicted, cannot object to the constitution of the grand jury.

INDICTMENT—SECRECY IN REGARD TO THE PROCEEDINGS OF THE GRAND JURY, TO WHOM APPLICABLE.—The same principle which forbids disclosure by the grand jurors applies to all persons authorized by law to be present in the grand jury room, whether it be their clerk, or the officer in charge, or the prosecuting attorney.

INDICTMENT.—THE PROSECUTING ATTORNEY MAY BE PRESENT before the grand jury to give advice, to interrogate witnesses, to draw such bills as the jurors are prepared to find, and to give such general instructions as they may require, but he is not to influence or direct them in respect to their finding, nor ought he to be present, when they are deliberating on the evidence, or when their vote is taken.

TRIAL—CHANGE OF VENUE—ALLEGATIONS IN DEFENDANT'S AFFIDAVITS, FAILURE TO DENY FORMALLY, EFFECT OF.—Whatever right a defendant may have to complain of the failure of the State's attorney to file a formal denial of the allegations in the affidavits of such defendant, taken with a view to the hearing of a motion for a change of venue, will be regarded as waived, if he proceeds to a hearing without objecting to the absence of such denial.

PLEADING—JOINDER OF COUNTS.—A count for maintaining a nuisance under section 7 of the Illinois Dram Shop Act may be joined in an indictment with one or more counts charging illegal sales of liquor under section 2 of the same act.

THE plaintiff in error was indicted for selling intoxicating liquors without a license and maintaining a nuisance, in contravention of sections 2 and 7 of the Dram Shop Act of Illinois. After a motion by him to quash the indictment had been overruled, he moved for a change of venue on the ground of the prejudice of the inhabitants of the county, the motion being supported by his own petition and the affidavits of fifteen persons. The people filed the affidavits of sixty-seven persons, and the motion was heard upon the affidavits so filed by both parties. The defendant's prayer for a change of venue was denied. Upon the trial the jury returned a verdict of guilty on the first fifteen counts and on the twenty-fifth count of the indictment. The defendant moved for leave to file the affidavits of fourteen grand jurors and of the officer in charge of the jury, and his own affidavit, *nunc pro tunc*, in support of his motion to quash the indictment. The motion was denied, and the defendant then suggested to the court that twelve of the grand jurors had not agreed to the indictment, and moved to have the record amended. In support of this motion to amend and a motion for a new trial, the defendant read his own affidavit and that of the officer in charge of the jury, and the affidavits of fourteen jurors who swore that they did not concur with the twenty-fifth count of the indictment, by which the defendant was charged with keeping a nuisance, and that this count was not agreed to by twelve jurors. On behalf of the people the affidavits of fifteen jurors were filed, to the effect that they did consent to the finding of the entire indictment, and that more than twelve jurors consented thereto. These motions were overruled, as well as an-

other in arrest of judgment, and judgment was then given in accordance with the verdict.

E. F. Dutcher, Franc Bacon, and D. D. O'Brien, for the plaintiff in error.

D. W. Baxter, state's attorney, for the people.

¹⁸⁰ **MAGRUDER, J.** The plaintiff in error in this case offered to show by the affidavits of some of the grand jurors that twelve members of the grand jury did not concur in the finding of the twenty-fifth count of the indictment, which charged him with keeping a place that was a common nuisance. Is it allowable to show by the sworn statements of grand jurors that twelve of their number did not consent or agree to the finding of the indictment returned into court, or is the indorsement of the same as "a true bill" by the foreman conclusive upon the subject?

When we recur to the authorities for an answer to this question we find them conflicting. Greenleaf in his work on Evidence says: "Grand jurors may also be asked whether twelve of their number actually concurred in the finding of a bill, the certificate of the foreman not being conclusive evidence of that fact": 1 Greenleaf on Evidence, sec. 252, referring to 4 Hawk. P. C., b. 2, c. 25, sec. 15; *McLellan v. Richardson*, 13 Me. 82; *Low's Case*, 4 Me. 439; 16 Am. Dec. 271; *Commonwealth v. Smith*, 9 Mass. 107. The leading case in favor of the position that such testimony may be resorted to is *Low's Case*, 4 Me. 439, 16 Am. Dec. 271, which has been followed in *State v. Symonds*, 36 Me. 128, and *Territory v. Hart*, 7 Mont. 42. To the same effect also are *State v. Horton*, 63 N. C. 595; *People v. Shattuck*, 6 Abb. N. C. 33; *Sparrenberger v. State*, 53 Ala. 481; 25 Am. Rep. 643.

¹⁸¹ On the other hand, Wharton, in his work on American Criminal Law, says: "The better opinion is that an affidavit of a grand juror will not be received to impeach or affect the finding of his fellows, even for the purpose of showing how many were present when the bill was found, or how many voted in its favor": 1 Wharton's American Criminal Law, 1868, sec. 509. The same author makes the same statement in his work on Criminal Pleading and Practice, 8th ed., sec. 379. He also says, in his work on Criminal Evidence: "A grand juror's testimony, however, will not be received to impeach the finding of his fellows, or even to show what was the vote on the finding": Wharton's Criminal Evidence, sec. 510.

In the American and English Encyclopedia of Law, in a note to the statement in the text, that "grand jurors may not be compelled to testify as to the proceedings in the jury-room unless it becomes necessary for purposes of public justice or for the protection of private rights, it is said: "In some states it has been held that a grand juror may not be compelled to testify as to whether twelve concurred in finding the indictment. . . . But courts have held differently elsewhere"; and the authorities on both sides of the question are referred to: 9 Am. & Eng. Ency. of Law, 17, note 7.

The cases quoted in the text-books as sustaining the position that such testimony cannot be resorted to are the following: *State v. Baker*, 20 Mo. 338; *State v. Hamlin*, 47 Conn. 114; *State v. Gibbs*, 39 Iowa, 318; *State v. Davis*, 41 Iowa, 311; *State v. Mewherter*, 46 Iowa, 88; *Creek v. State*, 24 Ind. 151; *Watts v. Washington Territory*, 1 Wash. (Ter.) 409; *State v. Oxford*, 30 Tex. 428; *The King v. Marsh*, 6 Ad. & E. 236; *State v. Fasset*, 16 Conn. 457; *State v. Wammack*, 70 Mo. 410; *State v. Beebe*, 17 Minn. 241; *State v. Baltimore etc. R. R. Co.*, 15 W. Va. 362; 36 Am. Rep. 803; *Sims v. State*, 60 Ga. 145.

In the leading case of *State v. Baker*, 20 Mo. 338, *Low's Case*, 4 Me. 439, 16 Am. Dec. 271, and the authorities therein referred to, are commented upon and distinguished; and it appears that the decision of the ¹⁸² latter case was based mainly upon peculiar provisions of the constitution of Maine as it existed in 1827. After a careful examination of the foregoing authorities we are inclined to hold the safer rule to be that the affidavits of grand jurors ought not to be received for the purpose of showing that twelve of their members were not in favor of finding a true bill against the accused.

Section 16 of the Jury Act of this state provides that "a full panel of the grand jury shall consist of twenty-three persons, sixteen of whom shall be sufficient to constitute a grand jury"; and section 17 thereof provides that "after the grand jury is impaneled, it shall be the duty of the court to appoint a foreman, who shall have power to swear or affirm witnesses to testify before them, and whose duty it shall be, when the grand jury, or any twelve of them, find a bill of indictment to be supported by good and sufficient evidence, to indorse thereon, 'A true bill'; where they do not find a bill to be supported by sufficient evidence, to indorse thereon, 'Not a true bill'; and shall, in either case, sign his name as foreman at the foot of said indorsement, and shall

also, in each case in which a true bill shall be returned into court as aforesaid, note thereon the name or names of the witness or witnesses upon whose evidence the same shall have been found": 2 Starr and Curtis Annotated Statutes, 1424, 1425. Section 5 of division 11 of the Criminal Code also provides that "in finding a bill of indictment, at least sixteen of the grand jury shall be present, and at least twelve of them shall agree to the finding"; section 9 of said division provides that "all exceptions which go merely to the form of an indictment shall be made before trial, and no motion in arrest of judgment, or writ of error, shall be sustained for any matter not affecting the real merits of the offense charged in the indictment"; and section 10 of said division provides that "no grand juror, or officer of the court, or other person, shall disclose that an indictment for felony is found, etc., . . . nor shall any grand juror state how any member of the jury voted, ¹⁶³ or what opinion he expressed on any question before them, and the court, in charging said jury, shall impress upon their minds the provisions of this section": 1 Starr and Curtis, 857, 859.

The statutory injunction of secrecy, as to "how any member of the jury voted, or what opinion he expressed," is in line with the general policy of the law, which is that the preliminary inquiry as to the guilt or innocence of an accused party shall be secretly conducted. In furtherance of justice and upon grounds of public policy, the law requires that the proceedings of grand juries shall be regarded as privileged communications, and that the secrets of the grand jury room shall not be revealed. The reasons, usually given for this requirement in the text-books and decided cases, are to prevent the escape of the accused, to secure freedom of deliberation and opinion among the grand jurors, and to prevent the testimony produced before them from being contradicted at the trial by subornation of perjury. (1 Greenleaf on Evidence, sec. 252.)

If grand jurors are allowed to state, that twelve of their number did or did not concur in finding the indictment, it is difficult to see how they can avoid disobeying the injunction not to state "how any member of the jury voted," because the accuracy of the statement as to how many did or did not concur could hardly be tested by cross-examination, or otherwise, without revealing what particular jurors voted for the indictment, or what ones voted against it. Accordingly, the requirement of secrecy should apply as well to the question whether

or not twelve members of the grand jury agreed to the finding, as to any of the other proceedings of the body.

In *State v. Baker*, 20 Mo. 338, the defendant moved to quash the indictment upon the alleged ground, that it "was not found by any twelve of the grand jury"; but it was held that members of the grand jury would not be permitted to state the fact that twelve did not concur; and the court said: "The grand juror has an important trust to perform. . . . Now, in ¹⁸⁴ order to protect him, as well as to secure the punishment of the guilty, strict and rigid secrecy is required and enjoined upon the members of this inquest. The grand juror is expressly exempted from all obligation to testify in what manner he or any other member of the grand jury voted on any question before them, or what opinions were expressed by any juror in relation to such question. . . . Counsel for the prisoner contends, that the grand jurors do not testify how they voted on this case when before them; they only testify that they did not vote at all. This is just as much prohibited, as their voting is, from being told; for, by allowing each one to say, 'I did,' or 'did not, vote,' the prisoner will easily find out those who voted for the bill and those who did not vote for it. . . . This is what the law will not allow. Again, permit this conduct or this course of acting before the grand jury to be the subject of proof on a motion to quash, etc., . . . and a corrupt grand juror may withhold his vote on purpose, in order to be used afterwards as a witness. . . . Again, permit this course to be allowed, and every inducement for a guilty man and his friends to tamper with the grand juror is at once presented."

In *State v. Gibbs*, 39 Iowa, 318, the defendant filed, in support of his motion to set aside the indictment, affidavits of four grand jurors for the purpose of showing that the indictment had not been found by the "concurrence of twelve grand jurors," and it was held that such affidavits were inadmissible the court saying: "The same reasons for refusing to allow a petit juror to impeach his verdict by an affidavit to the effect that he did not assent thereto, apply with equal, if not greater, force, for refusing to hear a grand juror, after coming into open court with an indictment against a defendant to say that he did not vote for the indictment. One of the reasons for rejecting an affidavit of a petit juror impeaching his verdict, is that it might be the means, in the hands of a dissatisfied juror, to destroy a verdict at any time after he had

assented to it. . . . ¹⁸⁵ So ought a like affidavit by a grand juror to be rejected, because it might be the means, in his hands, if dissatisfied with the indictment, of destroying an indictment at any time after it has been presented with all the formalities of the law. Not only should such affidavits be rejected on this ground, but the statute has expressly made it the duty of every member of the grand jury to keep secret its proceedings, etc. . . . Thus the statute guards the proceedings of the grand jury from publicity, and with especial care does it prohibit the disclosure of the votes of the individual grand jurors on finding an indictment."

The statute of Illinois expressly provides, that the indorsement of "a true bill" upon the indictment by the foreman of the grand jury shall be evidence, that it has been found by twelve of the grand jurors. The further requirement, that the names of the witnesses shall be indorsed upon the bill, serves to fix its identity, and as a protection against mistakes. When the indictment, thus indorsed, is filed, it becomes a record of the court, "and it should not be subjected to the attacks of parol proof by the members of the very body who, in presence of their foreman, stood by in silence and saw him present it to the court": *State v. Baker*, 20 Mo. 338. The hardship, which an accused party may suffer because he is not allowed to go behind an indictment to see how it has been found, will be small compared with the incalculable mischief which will result to the public at large from a disclosure of what the law deposits in the breast of a grand juror as an inviolable secret. An innocent person will not be hurt by being forbidden to thus go behind the indictment, "for he can always vindicate himself in a trial upon the merits": *State v. Baker*, 20 Mo. 338.

The cases, which hold that the testimony of grand jurors may be received to show a nonconcurrence of twelve in the finding of the indictment, also hold that the suggestion of such nonconcurrence must be made at the earliest possible opportunity ¹⁸⁶ which the accused has to be heard in court. The indictment, when properly indorsed and returned into court and filed, being a record of the court, has all the legal verity which belongs to that species of evidence. An averment by way of plea cannot be received against a record. The objection of nonconcurrence, being an objection to answering the indictment in any form, cannot be taken by way of formal plea. Nor is the verity of a record disputable

by evidence on the trial. It is not triable by a jury, but is addressed to the court. As a general rule pleading to an indictment admits its genuineness as a record: *Low's case*, 4 Me. 439; 16 Am. Dec. 271; *Sparrenberger v. State*, 53 Ala. 481; 25 Am. Rep. 643; 1 Bishop's Criminal Procedure, 2d ed., sec. 885. "After a party has pleaded to an indictment, and been convicted, it is too late to object to the constitution of the grand jury": 1 Bishop's Criminal Procedure, 2d ed., sec. 887. Although the general rule, that the motion to quash can be founded only on some defect apparent on the face of the indictment, has been made to yield in some instances in favor of the discretionary power of the court to look into what is brought to its attention outside of the indictment, yet even in such instances the motion to quash ought to be made at an early stage of the cause, and has been held to be inadmissible after verdict: 1 Bishop's Criminal Procedure, secs. 762, 763.

The cases holding the testimony of grand jurors to be allowable to establish the nonconcurrence of twelve in the finding of the indictment, also hold that the motion to quash, or dismiss on account of such nonconcurrence, will only be sustained in a very clear case, and where it is made to appear manifestly and beyond reasonable doubt that the indictment was not agreed to by the requisite number of grand jurors: *Lowe's case*, 4 Me. 439; 16 Am. Dec. 271.

In the case at bar, the suggestion, that twelve jurors did not consent to the finding of the twenty-fifth count of the indictment, was not made to the court until the case had been tried, and the jury had returned a verdict of guilty against the defendant. ¹⁸⁷ If it were allowable to consult the affidavits of the grand jurors submitted upon the motion to quash in this case, it would not only appear that the nonconcurrence of twelve was not clearly established, but rather that the last count with all the others was agreed to by twelve of the grand jurors. The fact, that five members of the grand jury, who swore on behalf of the defendant that twelve did not concur, have also sworn on behalf of the people that twelve did concur, illustrates the danger of the doctrine contended for by the plaintiff in error. We are, therefore, of the opinion, that the trial court committed no error in refusing to quash the indictment, or in overruling the motion to amend the record.

The same principle, which forbids disclosure by the grand jurors, applies to all persons authorized by law to be present

in the grand jury room, whether it be their clerk, or the officer in charge, or the prosecuting attorney: *People v. Hulbut*, 4 Denio, 133; 47 Am. Dec. 244; *State v. Hamlin*, 47 Conn. 114; 1 Greenleaf on Evidence, sec. 252.

We find nothing in the record to indicate that there was any improper conduct on the part of the prosecuting attorney before the grand jury. He may be present to give advice, to interrogate witnesses, to draw such bills as the jurors are prepared to find, and to give such general instructions as they may require, but he is not to influence or direct them in respect of their finding; nor ought he to be present when they are deliberating upon the evidence, or when their vote is taken: 1 Bishop's Criminal Procedure, 2d ed., sec. 861; Wharton's Criminal Pleading and Practice, 8th ed., sec. 366; *State v. Baker*, 20 Mo. 338; *Commonwealth v. Bradney*, 126 Pa. St. 199; *State v. Adam*, 40 La. Ann. 746.

We think that the motion for a change of venue on account of the alleged prejudice of the inhabitants of the county was properly overruled. The defendant filed affidavits to show the existence of such prejudice, and the people filed affidavits to show that there was no such prejudice. The trial court decided in favor of the showing made by the latter affidavits, ¹⁰⁰ and we are not prepared to hold that its decision was contrary to the right of the case: *Dunn v. People*, 109 Ill. 635; *Price v. People*, 131 Ill. 223. It is objected that the state's attorney did not file a formal denial of the allegations of defendant's petition for a change of venue. The statute says: "the attorney on behalf of the people may deny the facts stated in the petition, and support his denial by counter-affidavits," etc.: Rev. Stats., c. 146, sec. 22. It would appear that in *Dunn v. People*, 109 Ill. 635, and *Price v. People*, 131 Ill. 223, general denials of the facts tending to show prejudice as stated in the petition were filed by the state's attorneys. In the present case, however, the application for change of venue was heard upon the counter-affidavits of the people without any objection by the defendant that the formal denial had not been filed; and we think that the right of the defendant to complain, if it ever existed, has been waived by failing to object, and by proceeding to a hearing in the absence of the formal denial.

A count for maintaining a nuisance under section 7 of the Dram Shop Act may be joined in an indictment with one or more counts charging illegal sales of intoxicating liquors un-

der section 2 of the same act: *State v. McLaughlin*, 47 Kan. 143. Therefore, the objection to the first instruction given for the people is without force. Equally untenable are the objections urged against instructions for the people numbered 5 and 6.

The judgment of the appellate court is affirmed.

Judgment affirmed.

INDICTMENT, NOT GENERALLY IMPRACHABLE BY TESTIMONY OF GRAND JURORS: See notes to *Low's case*, 16 Am. Dec. 281-285; and *Commonwealth v. Green*, 12 Am. St. Rep. 915-919.

INDICTMENT, SECRETORY OF THE GRAND JURY ROOM: See note to *Commonwealth v. Green*, 12 Am. St. Rep. 914, 915. Neither the prosecuting attorney nor the clerk of the grand jury will ordinarily be compelled to reveal their proceedings: *People v. Hulbut*, 4 Denio, 133; 47 Am. Dec. 244.

INDICTMENT, DEFENDANTS' RIGHT TO OBJECT TO VALIDITY OF, WAIVED by pleading thereto and procuring a change of venue: *Cooper v. State*, 120 Ind. 377.

KOPP v. REITER.

[146 ILLINOIS, 457.]

VENDOR AND PURCHASER—STATUTE OF FRAUDS, MEMORANDUM, WHEN SUFFICIENT TO SATISFY.—To meet the requirements of the statute of frauds, it is not necessary that the writing relied upon should be couched in any particular form, but it must contain, either on its face, or by reference to other writings, the names of the parties, vendor and vendee, a sufficiently clear and explicit description of the property to render it capable of being identified, together with the terms, condition (if any), and price to be paid, or other consideration to be given; and it must be signed by the party to be charged, or if signed by an agent, the authority of such agent must be in writing signed by the party to be charged, and the contract or memorandum or note thereof made by the agent must also be in writing and signed by him.

VENDOR AND PURCHASER—STATUTE OF FRAUDS—UNDELIVERED DEED—MEMORANDUM.—AN UNDELIVERED DEED executed by the owner of land cannot be resorted to for the purpose of helping out the requirements of the statute of frauds, unless it is a memorandum or note of the contract, or, in other words, refers to the terms and conditions of the contract.

VENDOR AND PURCHASER—STATUTE OF FRAUDS, WHEN NOT SATISFIED BY UNDELIVERED DEED.—Where a contract for the sale of land has been entered into by the husband of the owner, without either written or parol authority from his wife, a deed afterwards executed by her, but never delivered, cannot be used either to supplement that contract or to show a ratification thereof by her.

VENDOR AND PURCHASER—STATUTE OF FRAUDS—DEED DEPOSITED IN ESCROW, WHEN NOT A SUFFICIENT MEMORANDUM.—Where the owner of land, without making a valid executory contract to convey it, deposits

a deed of it with a third person to be delivered to the grantee upon certain terms, he may cancel the instructions given to such third person, and recall the deed at any time before the specified terms have been complied with, nor can such deed, invalid as a conveyance for want of delivery, be considered as a memorandum in writing, signed by the owner agreeing to convey the land therein described so as to authorize a decree of specific performance. A deed which has not been delivered is not, by its own force and aside from any contract to which it may be related, a sufficient writing to meet the requirements of the statute of frauds.

SUIT to cancel a contract and trust deed as clouds upon the title of the appellee, Cora E. Reiter, to a certain lot. On December 27, 1890, Edward Reiter, the husband of said appellee, contracted in writing for the sale of the said lot to the appellant Kopp, who paid two hundred and fifty dollars as earnest money, and agreed to pay two thousand seven hundred and fifty dollars within five days after the title was shown to be good, provided that Mrs. Reiter should then have a warranty deed to the property ready for delivery; for the balance Kopp was to give his note secured by a trust deed on the lot. Reiter had been brought into communication with Kopp by an employee of the real estate firm of Cronkrite & Co., and the earnest money and contract were deposited at their office. The abstract was duly delivered to Kopp, and who, after examining it, demanded an affidavit establishing the death of a party whose death was recited in one of the deeds. Meanwhile, the warranty deed had been executed by Mrs. Reiter and her husband, but was retained by the latter. Kopp also executed the note and trust deed, but they were never delivered to Reiter. The affidavit demanded was never obtained by Reiter, who declared the objection to be interposed merely for delay. On Saturday, January 17, 1891, Mrs. Reiter told her husband that, unless Kopp closed the transaction on that day she would not permit the deed to be delivered. Kopp was communicated with through Cronkrite & Co., and said he would not insist on his demand for the affidavit, but could not pay the money until the following Monday. Reiter, upon receiving this answer, said that the business must be completed on that Saturday or not at all; and when Kopp came on Monday to pay the money he was told it was too late. On Wednesday Kopp tendered the two thousand seven hundred and fifty dollars and the note and trust deed; but these were refused by Reiter, who after a few days destroyed the warranty deed.

George R. Grant and Charles E. Pope, for the appellants.

Ashcraft and Gordon, for the appellees.

⁴⁴³ MAGRUDER, J. Under the facts did Mrs. Reiter, the owner of the lot, make any such contract for its sale and conveyance as a court of equity will compel her to perform?

⁴⁴⁴ Section 2 of the statute of frauds provides as follows: "No action shall be brought to charge any person upon any contract for the sale of lands, etc., . . . unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party": 1 Starr and Curtis' Annotated Statutes, c. 59, sec. 2, page 1192. It cannot be contended here, that there has been any such part performance of a parol contract by payments, possession, and improvements, as will take the case out of the statute of frauds. The purchaser, Kopp, never took possession of the lot, nor made any improvements upon it. The only payment he made was that of the earnest money, two hundred and fifty dollars. This amount, however, was not paid to Mrs. Reiter, but to Cronkrite & Co., who never had any authority from her, written or otherwise, to make sale of the lot, or to take any other steps in regard to it.

We have held in a number of cases that, in order to ascertain what sort of writing is sufficient to meet the requirements of the statute as above quoted, no form of language is necessary, if only the intention can be gathered; and that any kind of writing from a solemn deed down to mere hasty notes or memoranda in books, papers, or letters will suffice; but that the writings, notes, or memoranda must contain on their face, or by reference to others, the names of the parties, vendor and vendee, a sufficiently clear and explicit description of the property to render it capable of being identified from other property of like kind, together with the terms, conditions (if there be any), and price to be paid, or other consideration to be given; and such writing, note, or memorandum must be signed by the party to be charged, or, if signed by an agent, the authority of such agent must be in writing signed by the party to be charged, and the contract, or memorandum, or note thereof made by the agent must also be in writing and signed by him: *McConnell v. Brillhart*, 17 Ill. 354; 65 Am. Dec. 681; *Cossitt v. Hobbs*, ⁴⁴⁵ 56 Ill. 231; *Wood v. Davis*, 82

Ill. 311; *Albertson v. Ashton*, 102 Ill. 50; *Chappell v. McKnight*, 108 Ill. 570; *Lasher v. Gardner*, 124 Ill. 441.

The only writing ever signed by Mrs. Reiter in this case was the warranty deed which she executed on or about January 7, 1891, and which remained in the hands of her husband, and was never delivered to Kopp, or to Vierling, or Hammond. We do not think, that this deed can be regarded, under the facts disclosed by the record, as such a memorandum or note of a contract for the sale of the land, as is sufficient to take the case out of the statute of frauds. The contract of December 20, 1890, was executed by and between Mr. Reiter and the appellant, Kopp, but not by Mrs. Reiter, the owner of the lot. She gave her husband no written authority to act as her agent for the sale of the lot, or to sell it, or to sign any contract for the sale of it. We think that the findings of the master, to whom the cause was referred, and whose report was confirmed by the court below, are sustained by the evidence. He finds in his report, that, before said contract was executed, Mrs. Reiter was not consulted about it, and did not consent to it, and did not even give her husband any parol authority to sell the lot. The testimony shows, that she was opposed to selling the lot, and reluctantly executed the deed at the request of her husband. Although he informed her of the execution of the contract after he had signed it, yet it was never shown to her, and she never saw it until the hearing of the cause.

The master has found, and the evidence shows that the deed was not executed with reference to the previous written contract between Reiter and Kopp, but with the understanding that Mr. Reiter was to deliver it upon receiving three thousand dollars in money and a note and trust deed for two thousand dollars. The deed simply purported to convey the premises from the grantors to the grantee for a consideration of five thousand dollars, but it did not recite the terms of the contract or in any manner refer to the contract.

446 Counsel for appellant disclaim any reliance upon the undelivered deed as a conveyance of title, but contend that it is such written evidence of the contract of sale as satisfies the statute of frauds, whose object and meaning "is to reduce contracts to a certainty in order to avoid perjury on the one hand (by the setting up of parol evidence which is easily fabricated), and fraud on the other": *Welford v. Beazely*, 3 Atk. 503); that the nondelivery of the deed, regarded as such writ-

ten evidence, is immaterial; that it is immaterial whether Mrs. Reiter did or did not intend to charge herself thereby; and that the deed was an admission in writing of what the contract was. It is true, that an undelivered deed is sometimes resorted to in order to help out the requirements of the statute of frauds, but it can hardly be said that the circumstances under which such a deed can be so used are disclosed by the facts in the present record. The language of the statute is: "Some memorandum or note thereof." The word "thereof" refers back to the word, "contract." There must be some memorandum or note in writing of the contract. Hence, if an undelivered deed executed by the owner can be regarded as meeting the requirements of the statute it must be a memorandum or note of the contract, or, in other words, must refer to the terms and conditions of the contract.

In *Cagger v. Lansing*, 43 N. Y. 550, it is said: "The counsel . . . insists that the deed executed by the intestate and delivered in escrow is a contract for the sale of the land executed by the intestate. This position cannot be sustained. The deed purports to be a conveyance of all the intestate's interest in the premises for a consideration therein expressed of one thousand dollars, but is wholly silent as to the terms of the contract pursuant to which it was made."

In *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427, it was held, that one who had deposited a deed with a third person with directions to deliver it to the grantee on the happening of a certain event, but had made no valid executory contract to convey the land, ⁴⁴⁷ could revoke the directions to the depository and recall the deed at any time before the conditions of the deposit had been complied with, provided those conditions were such that the title did not pass at once to the grantee upon delivery of the deed to the depository; and it was there said: "If a person, who has made a parol agreement to sell land, sign an instrument in the form of a conveyance of such land to the vendee, and deposit it in escrow, if such instrument contains the terms of the parol agreement including the consideration, it is a sufficient compliance with the requirements of the statute of frauds."

In *Swain v. Burnette*, 89 Cal. 564, it was held that an undelivered deed executed in pursuance of an oral agreement of sale cannot be regarded as a sufficient memorandum to satisfy the statute of frauds, unless it is shown to have contained a memorandum of the oral agreement: *Freeland v. Charnley*,

80 Ind. 182; *Parker v. Parker*, 1 Gray, 409; *Overman v. Kerr*, 17 Iowa, 485; *Cannon v. Cannon*, 26 N. J. Eq. 316; *Johnston v. Jones*, 85 Ala. 286.

Many of the cases cited as authority for the position that a deed executed by an owner of land, but not delivered, is a sufficient memorandum of a contract of sale under the statute will thus be found, upon examination, to refer to deeds containing the terms of the contract. In the case at bar, however, as has already been stated, the deed executed by Mrs. Reiter and her husband was a simple conveyance of the lot for a consideration of five thousand dollars, and was silent as to the terms of the contract of December 27, 1890.

Where the owner of land has signed a written contract of sale, or some writing amounting to such a contract, but has failed therein to properly describe the property, a deed executed by him, but not yet delivered, may be looked to as a part of the transaction, and may be made to aid the prior agreement and secure its enforcement by supplying the defect in such description. Thus, in *Jenkins v. Harrison*, 66 Ala. 345, to which reference is made by counsel for appellant, a ⁴⁴⁸ memorandum in writing, purporting to contain the terms of a contract for the sale of land, and signed by both of the parties, failed to describe the property with the certainty and definiteness requisite to a specific performance, but deeds, inoperative for want of delivery, were executed by the parties a few days afterwards which did correctly describe the land; and it was held that such undelivered deeds and the memorandum signed by the parties might, when taken together, satisfy the requisitions of the statute of frauds, the court saying: "When the memorandum . . . is taken and read, as it must be, in connection with the deeds subsequently executed, there is no doubt or uncertainty as to the terms of the contract for the sale of the lands. True, the deeds do not expressly refer to the memorandum; but they were all executed as parts of a single transaction between the same parties having reference to the same subject matter."

In *Work v. Cowhick*, 81 Ill. 317, property was struck off to appellant as the highest bidder at an administrator's sale, and the administrator's deed of the land and a note signed by the purchaser, in which she promised to pay to the administrator the purchase money "for land purchased by Elizabeth Work this day at administrator's sale," were left with a third person to be held until the purchaser should

obtain personal security on the note, and execute a mortgage at which time the deed was to be delivered, it was held, in a suit by the administrator against the purchaser for a failure to carry out the sale, that the making of the deed and the signing of the note might be regarded as one transaction, and that together they constituted such proof as amounted to a compliance with the statute of frauds, the description in the deed indicating what land was referred to by the imperfect description in the note.

So, in *Wood v. Davis*, 82 Ill. 311, written authority to an agent to sell land and the terms of a contract of sale were embodied in letters written by the owner, who also sent to the agent an executed deed to be delivered, but which was never in fact ⁴⁴⁹ delivered; and when, after refusal by the agent to consummate the trade, suit for damages was brought by the purchaser against the owner, it was held that such a contract was established as took the case out of the operation of the statute of frauds, and that, although the memoranda contained no description of the land, the description in the undelivered deed could be referred to to supply the defect.

It is manifest, however, that all these cases differ from the case at bar. Here, the undelivered deed executed by Mrs. Reiter cannot be used to supplement or supply any defect in a prior contract of sale, or a prior note, or memorandum of a contract of sale, because there was no prior contract, or note, or memorandum which she had signed or to which she was a party, or which she had authorized to be made. The contract of sale theretofore entered into was made by Mr. Reiter without either written or parol authority from her. Nor can her undelivered deed, subsequently destroyed, be regarded as a ratification of the agreement made by her husband, because it was not made in pursuance of that agreement or to carry it out, but without any reference to it.

Where, as is the case here, the owner of land, without making a valid executory contract to convey it, deposits a deed of it with a third person to be delivered to the grantee upon certain terms, he may cancel the instructions given to such third person and recall the deed at any time before the specified terms have been complied with; nor can such deed, invalid as a conveyance for want of delivery, be considered as a memorandum in writing, signed by the owner agreeing to convey the land therein described so as to authorize a decree of specific performance. A deed, which has not been deliv-

ered, is not, by its own force and aside from any contract to which it may be related, a sufficient writing to meet the requirements of the statute of frauds.

For these reasons we think that the decree of the circuit court was right, and the same is accordingly affirmed.

Decree affirmed.

VENDOR AND PURCHASER.—STATUTE OF FRAUDS, MEMORANDUM, WHEN SUFFICIENT TO SATISFY.—The memorandum of a contract for the sale of lands is not sufficient unless it contains substantially the whole agreement, so that its essential terms may be ascertained from the writing without a resort to parol evidence: *Ments v. Newwitter*, 122 N. Y. 491; 19 Am. St. Rep. 514; *Ringer v. Holstess*, 112 Mo. 519. It need not express either the amount of the consideration or the time of payment: *Camp v. Moreman*, 84 Ky. 635. It must describe the land with sufficient exactness to render its identity certain, upon the introduction of extrinsic evidence simply disclosing the condition of the parties at and immediately before the making of the contract: *Watson v. Baker*, 71 Tex. 739.

VENDOR AND PURCHASER.—UNDELIVERED DEED NOT A SUFFICIENT MEMORANDUM to satisfy statute of frauds: *Johnson v. Brook*, 31 Miss. 17; 66 Am. Dec. 547. *Contra: Johnston v. Jones*, 85 Ala. 286, where it was held that a deed, drawn and executed with the knowledge of both parties, with a view to the consummation of the contract, embodying in itself the substance, though not all the details or particulars, of the contract, naming the parties, expressing the consideration, and describing the land with sufficient certainty, though not delivered—delivery being postponed until the happening of some future event (as the payment of a cash installment), is a note or memorandum of the contract sufficient to satisfy the statute. So a contract to convey land in payment of the indebtedness of the vendor, unless otherwise paid by a certain date, is binding upon the vendor from its delivery to a third person in escrow: *McDonald v. Huff*, 77 Cal. 279.

FOWLER v. LAMSON.

[146 ILLINOIS, 472.]

CONSTITUTION, CONSTRUCTION OF, BY SUPREME COURT OF STATE, BINDING UPON COURTS OF OTHER STATES.—If the supreme court of a state has ruled upon the effect of a provision in the constitution of that state, such ruling will be adopted by the courts of sister states whenever the meaning of the provision comes in question.

CORPORATIONS.—INDIVIDUAL LIABILITY OF STOCKHOLDERS UNDER CONSTITUTION OF KANSAS.—Although the supreme court of Kansas has not decided, in terms, that the constitutional provision relative to the individual liability of the stockholders of corporations is self-executing, it has fully recognized, and, in effect held, that stockholders of corporations organized under the constitution and statutes of that state are individually liable to the creditors of such corporation to an additional amount equal to the stock owned by them.

CORPORATIONS—ENFORCEMENT OF INDIVIDUAL LIABILITY OF STOCKHOLDERS, SPECIAL REMEDIES FOR.—Since the individual liability of stockholders of corporations exists only by force of some constitutional or statutory provision, and the person incurring that liability is presumed to do so subject to its enforcement by the special provision made for that purpose, and no other, the remedy thus indicated is the only one which is available for the enforcement of such liability.

CORPORATIONS—ENFORCEMENT OF INDIVIDUAL LIABILITY OF STOCKHOLDERS IN FOREIGN JURISDICTIONS.—When a special remedy is given creditors of a corporation against its stockholders, the liability of the latter cannot be enforced in any state except that in which the corporation was organized.

E. F. Thompson, for the appellants.

D. M. Kirton, for the appellee.

475 **WILKIN, J.** This is an appeal from a judgment of the appellate court for the first district, reversing a decree of the superior court of Cook county in favor of appellants, against appellees.

The bill upon which the decree was rendered was filed by said George W. Fowler, and alleged that at the October term, 1890, of said superior court, he recovered a judgment against the Cherokee Brilliant Coal and Mining Company for three thousand three hundred and twenty-one dollars and forty cents, and costs of suit; that a writ of *feri facias* issued thereon, directed to the sheriff of Cook county, who "demanded payment thereof, or property upon which to levy the same, from 476 S. Warner Lamson, president of said corporation, which being refused, said writ was returned unsatisfied, and said judgment remains wholly unpaid" that said company was incorporated in September, 1882, under the laws of the state of Kansas, and for a number of years thereafter carried on business; that at the date of its incorporation it was, and ever since has been, a part of the constitution of Kansas that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law"; and that at said time, and since, it has been, and now is, a part of the laws of said state that, "if any execution shall have been issued against the property or effects of the corporation, except a railroad or religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of the stock by him or her owned, together with any

amount unpaid thereon, but no execution shall issue against stockholders except upon an order of the court in which the action, suit, or other proceedings shall have been brought or instituted, made upon motion of the court, after reasonable notice in writing to the person or persons sought to be charged, and upon such motion such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action, to charge the stockholders with the amount of his judgment"; that said Cherokee Brilliant Coal and Mining Company was not a "railway, religious, or charitable corporation"; that the defendants became the owners of five hundred and twenty-one shares of the capital stock of said company, of the par value of one hundred dollars each, and are chargeable with liability to the creditors of said corporation equal in amount to the amount of stock so held by them; that said company became insolvent, and made an assignment of all its property on or about June 17, 1886; that by the laws of said state of ⁴⁷⁷ Kansas it is further provided that, "if any corporation created under this or any general statute of this state, except a railway or charitable or religious organization, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit, and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from the property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collection made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved"; that at the time of issuing said *feri facias* said corporation had for more than a year suspended business, and was thereby dissolved.

It was stipulated between the parties that the defendants were the owners of the shares of stock alleged in the bill, but the same had been fully paid for. The appellant Earle filed an intervening petition, setting up a judgment in his favor, against said corporation, for eleven hundred and sixty-two

dollars and fifty cents, rendered at the December term, 1890, the return of execution unsatisfied, etc., and joining in the general allegations of the bill. The prayer of the bill is that the defendants be decreed to pay said judgments.

For the purposes of this opinion the answer of defendants (except the stipulation above mentioned) may be treated as a general denial of the allegations of the bill, and expressly denying the jurisdiction of the court.

The cause having been referred to a master, he reported that all the material allegations of the bill were sustained by the proofs, and that the prayer thereof should be granted. Exceptions to this report were overruled, and a decree entered accordingly. That decree having been reversed by the appellate court, this appeal is prosecuted.

The first question presented for our decision is, whether under the laws of the state of Kansas, where said corporation was organized and is domiciled, appellees are individually liable to its creditors, to an amount equal to the stock thereof owned by them. The decision of this question depends upon whether the constitutional provision of that state above quoted is to be treated as self-executing, it being admitted that no direct legislation has been had carrying it into effect.

Whether or not such constitutional provision can be availed of by creditors to charge stockholders, individually, with the debts of a corporation, in the absence of legislative action in aid thereof, depends generally upon the language of the provision, and hence cases are to be found holding both ways on the question: See note to *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 836, 837. In this case, however, the question being as to the effect of a provision of the constitution of a sister state, the decisions of the supreme court of that state must be first looked to, and if it is found that it has ruled upon such provision, we will adopt that ruling: *Patterson v. Lynde*, 112 Ill. 207. Thus the supreme court of the United States said, in *Fairfield v. County of Gallatin*, 100 U. S. 50: "It is the peculiar province of the supreme court of a state to interpret its organic laws as well as its statutes and it is the duty, as well as the pleasure, of this court, to follow and adopt that court's interpretation." While it is, perhaps, true that the supreme court of Kansas has not decided, in terms, that said constitutional provision is self-executing, it has fully recognized, and in effect held, that stockholders of corporations organized under the constitution and foregoing statutes

of that state, are individually liable to creditors of such corporation to an additional amount equal to the stock owned by each of them: *Hentig v. James*, 22 479 Kan. 326; *Valley Bank etc. v. Ladies' Cong. Sewing Soc.*, 28 Kan. 423; *Howell v. Manglesdorf*, 33 Kan. 194; *Abbey v. Grimes Dry Goods Co.*, 44 Kan. 415.

It will be seen, however, by reference to the foregoing allegations of the bill, that two special modes are provided by the laws of Kansas by which creditors of corporations like the one in question may enforce the liability of stockholders: 1. By having judgment against the corporation, and execution issued against its property or effects returned *nulla bona*, he may have execution against the stockholders, etc.: Sec. 82, *supra*. 2. "If the corporation be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit," in which case the statute gives the stockholder sued a special remedy against other stockholders, by judgment and execution. "He may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from the property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collection made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved." It is well settled that these special remedies having been provided for the enforcement of the individual liability of stockholders created by the laws of Kansas, they alone can be pursued to enforce that liability: *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, and cases cited in note to *Thompson v. Reno Savings Bank*, 2 Am. St. Rep. 854; *Thompson on Liability of Stockholders*, sec. 56; *Cook on the Law of Stock and Stockholders*, sec. 219. The reason of this rule is manifest. The liability only exists by force of some constitutional or statutory provision, and the person ⁴⁸⁰ incurring that liability is presumed to do so subject to its enforcement by the special provision made for that purpose, and no other: *Lowry v. Inman*, 46 N. Y. 119, and authorities cited.

The amended bill in this case proceeds upon the allegation

that the corporation has been dissolved, but attempts to enforce the individual liability of the defendants by a proceeding entirely different from that prescribed by the statute of Kansas, and thus deprive the defendants of the speedy and adequate remedy given them by that statute against other stockholders, if they should be held liable. There is also the further insuperable objection to this proceeding, that it is an attempt to enforce the individual liability of the defendants in a jurisdiction other than that in which the corporation exists, the rule being, that when a special remedy is given creditors of a corporation against its stockholders, the liability cannot be enforced in another state: *Lowry v. Inman*, 46 N. Y. 119; *Christensen v. Eno*, 106 N. Y. 97; 60 Am. Rep. 429; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184. The reason for this rule is forcibly illustrated by the above-quoted statute of Kansas providing a remedy in case of the dissolution of a corporation, which remedy, it must be conceded, could only be enforced in the state of Kansas, where, presumably, the stockholders of the corporation generally reside.

For the reasons here given it is clear that the bill could not be maintained in this state. Judgments have not been obtained in this state, or elsewhere, against appellees. The proceeding is an attempt to enforce their individual liability as stockholders, by compelling them to pay judgments against the corporation. *Young v. Farwell*, 139 Ill. 326, citing numerous authorities, also sustains the position that this bill cannot be maintained in this state: See, also, *Bank of North America v. Rindge*, 154 Mass. 208; 26 Am. St. Rep. 240.

The judgment of the appellate court will be affirmed.

Judgment affirmed.

Enforcement in Other States of the Personal Liability of Stockholders.

The liability of stockholders to creditors for corporate debts has been treated generally in the exhaustive note to *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 806, and some of the cases dealing with the enforcement of that liability in foreign jurisdictions are referred to. In the present note the authorities there cited, as well as others in which the subject has been considered, will be collected for the purpose of bringing into clearer relief the doctrines which the courts have developed in discussing this somewhat perplexing branch of private international law.

Liability of Individual Stockholder Enforceable Everywhere, if Absolute and Unconditional.—If the intent of the legislature of the state in which a corporation is organized is obviously to impose on the stockholders an absolute liability analogous to, though less in extent than, that to which copartners are subject, the principles upon which the courts of other states will grant

their assistance for the purpose of enforcing that liability involve no difficulty. "In all such cases," observes the court in the leading case of *Lowry v. Inman*, 46 N. Y. 119, "the liability is personal, and, following the person, may be enforced as other personal obligations are enforced, and according to the course of procedure, in the place where the individual sought to be charged is found. It is not in such case a statutory remedy, or a liability based upon a statute, and which is confined in its operation to the limits of the sovereignty creating the corporation, and without extraterritorial force or obligation. It is like other obligations, assumed in the form prescribed by the laws of the place where made, and, being valid there, is enforceable everywhere. Its validity, interpretation, and effect are to be determined by the *lex loci*; but the remedy is governed by the *lex fori*." Of course in this, as in other instances, the foreign tribunal must be guided by the decisions of the domestic forum as to the precise character of the liability imposed: *Flash v. Conn*, 109 U. S. 371; *Glenn v. Liggett*, 135 U. S. 533; *Halsey v. McLean*, 12 Allen, 438; 90 Am. Dec. 157; *Patterson v. Lynde*, 112 Ill. 196. Hence it is no defense to an action to enforce such liability, that the laws of the state where the action is brought impose no personal liability upon the stockholders of corporations organized therein: *Hodgson v. Cheever*, 8 Mo. App. 318. Nor, *converso*, can the stockholders of a corporation created under the statutes of a state, in which they are not individually liable, be subjected to such liability in another state, by the statutes of which such a liability is imposed, merely on the ground that the corporation is doing business in that state: *Bateman v. Service*, L. R. 6 App. Cas. 386; *Second Nat. Bank v. Hall*, 35 Ohio St. 158.

Statutes Imposing Personal Liability Upon Stockholders Not Enforceable if Penal.—Numerous attempts have been made to interpose as a bar to actions in foreign courts to enforce the statutory liability of stockholders the well-recognized principle that penal laws of one state can have no operation in another: See cases cited in *Flash v. Conn*, 109 U. S. 371; Story on Conflict of Laws, secs. 620, 621. As far as the stockholders generally are concerned, however, it is now conceded that this principle has no application where the statute merely provides that they shall be answerable for a specified proportion of the debts which the corporate assets, in the common-law sense, are insufficient to liquidate. The obligation thus raised is purely contractual, the result of the shareholder's voluntary act in consenting to become a member of the corporation: *Aultman's Appeal*, 98 Pa. St. 506; *Lowry v. Inman*, 46 N. Y. 119; *Nimick v. Iron Works*, 25 W. Va. 184; *Norris v. Wrenschall*, 34 Md. 192; *Paine v. Stewart*, 33 Conn. 516; *Ovykendall v. Miles*, 10 Fed. Rep. 342; *Corning v. McCullough*, 1 N. Y. 47; 49 Am. Dec. 287; *Hawthorne v. Calef*, 2 Wall. 10; 2 Morawetz on Corporations, sec. 874; Cook on Stock and Stockholders, sec. 218.

On the other hand, if the liability imposed by the statute is predicated as the consequence of some neglect of duty, which is to render the directors or other officers liable for corporate debts, the statute is penal, and has no extraterritorial operation. This principle has been applied where the duty prescribed is to make certain reports as to the affairs of the corporation: *Halsey v. McLean*, 12 Allen, 438; 90 Am. Dec. 157; *First Nat. Bank v. Price*, 33 Md. 487; 3 Am. Rep. 204; *Derrickson v. Smith*, 27 N. J. L. 176. In *Ovykendall v. Miles*, 10 Fed. Rep. 342, Lowell, J., while admitting this to be the result of the decisions, remarked that the doctrine seemed to him "narrow and provincial." Considering that the several states of the Union constitute what is, for commercial purposes at least, practically a single

community, and that the provision in question virtually amounts merely to a declaration of the circumstances under which one citizen shall be liable to another for a larger proportion of a debt of which he has received the benefit than he would otherwise be, the result being to assimilate his obligation to that of a copartner, it is hardly possible to deny that there is some reason for the learned judge's stricture. Technically, it is true, a provision of this kind is penal, but the state, as such, is in no way interested in its enforcement, and it is to statutes which a foreign sovereignty has enacted for its own benefit or protection that the strict doctrine is primarily applicable, which denies to penal laws any extraterritorial force: *Story on Conflict of Laws*, sec. 621. That the courts have felt themselves constrained by analogy to adopt that doctrine in the case of a statute which raises a mere personal obligation between private persons who are citizens of a political body which embraces both the sovereignty which enacted the statute and the sovereignty in which it is sought to enforce it, is perhaps not an altogether satisfactory result of the theory that the states of the Union are independent societies.

In *Halsey v. McLean*, 12 Allen, 438, 90 Am. Dec. 157, the doctrine was carried still further, and held to be applicable to a provision by virtue of which shareholders were to remain liable, severally and individually, to the creditors, "until the whole amount of capital stock fixed and limited by the company should have been paid in, and a certificate thereof should have been made and recorded as prescribed" in a subsequent section. It was declared that the liability thus created was not of that absolute character which is necessary to give a right of action in a foreign jurisdiction, and the earlier case of *Erickson v. Nesmith*, 15 Gray, 221, 4 Allen, 233, was cited as sustaining the same doctrine. Why a liability, which is to subsist until it is discharged by the performance of the acts specified in the statute, should be rendered penal by its capacity for being so discharged, is not easy to understand. If the liability in this case is penal, it would follow that every liability to pay money is penal, for a debtor may always clear himself by payment of his debt. In *Halsey v. McLean*, 12 Allen, 438, 90 Am. Dec. 157, the court believed itself to be deciding in conformity with the judicial opinion of New York, the state in which the statute involved had been enacted, and *Woodruff etc. Iron Works v. Chittenden*, 4 Bosw. 417, was cited. But that case is no longer law in New York, for it was held in *Wiles v. Suydam*, 64 N. Y. 173, that the liability under the provision referred to is contractual. Finally, both on principle and the authority of the case last cited, the supreme court of the United States has pronounced in favor of this view: *Flask v. Conn.*, 109 U. S. 371. Mr. Justice Woods states the effect of the provision thus: "Every one who becomes a member of the company by subscribing to its stock assumes this liability, which continues until the capital stock is all paid up and a certificate of the fact is made, published, and recorded. The fact that the liability ceases when these events take place does not change its nature, and make that a penalty which would, without such limitation, be a liability founded on contract." In *Kimball v. Davis*, 52 Mo. App. 194, a similar ruling was made in regard to a statute providing that the publication of the articles of incorporation in a certain manner should be necessary as a condition precedent to the exemption of the stockholders from personal liability. On the whole, therefore, it would appear that the weight of authority is in favor of the doctrine that the mere fact of the statutes having specified a way in which the stockholders may discharge themselves of their personal liability does not deprive that li-

bility of its contractual character, or render it nonenforceable in a foreign jurisdiction.

Some discussion has arisen as to the effect of the "double liability" clause. In *Kritzer v. Woodson*, 19 Mo. 327, it was intimated that a statute containing such a clause was highly penal. In a later case, *Perry v. Turner*, 56 Mo. 418, the same court declined to express an opinion as to whether this or the opposite view was correct. The court of appeals in the same state has declared against the penal character of the clause: *Kimball v. Davis*, 52 Mo. App. 194; and in *Paine v. Stewart*, 33 Conn. 516, the same view prevailed. On principle there would seem to be no difficulty in holding that no statute can be penal which does not seek to impose a higher measure of liability than the members of the corporation would be subject to if they were simply copartners, and that, as a "double liability" clause creates a much more limited liability than that of copartners, it should not have the effect of converting that clause into a penal one.

Remedies for the Enforcement of the Personal Liability of Stockholders.—If the statute imposes a general personal liability upon stockholders, and designates no particular mode in which this liability is to be enforced, the course of proceedings must ordinarily be regulated by the *lex fori* applicable to similar cases: *Lowry v. Inman*, 46 N. Y. 119. This rule, however, is to be taken subject to the qualification that the creditor is not confined to the special remedy which the legislature of the state in which the action is brought may have prescribed for the enforcement of the personal liability of stockholders in domestic corporations. Any other doctrine would, it is clear, amount practically to a denial of the right of action under any circumstances. Thus in *Aldrich v. Anchor Coal etc. Co.* (Oregon Sup. Ct., April 10, 1893), a case involving the effect of the Californian statute which makes each stockholder personally and individually liable for such proportion of each debt or claim against the corporation as the amount of his stock bears to the whole subscribed capital stock, it was held that an action at law would lie against a stockholder resident in Oregon, although the only manner in which the personal liability of the members of corporations organized in that state was by a bill in equity.

The intention of the legislature that the *lex fori* should be left to operate is equally clear, where the statute merely provides, that an action may be brought against the persons designated as liable, either jointly or severally. "Such a provision neither expressly denies the general remedies given by law against debtors, nor is there any rule of construction which attaches an implied denial of those remedies to such a clause": *Ex parte Van Riper*, 20 Wend. 614 (per Cowen, J.).

On the other hand where the remedy given is specifically laid down in the statute, and the legislature plainly intends that such remedy should enter into, and constitute a part of, the creditor's rights, he is confined to the procedure thus prescribed, and cannot enforce a stockholder's liability in any foreign tribunal: *Lowry v. Inman*, 46 N. Y. 119; *Christensen v. Eno*, 106 N. Y. 97; 60 Am. Rep. 429; *Nimick v. Iron Works Co.*, 25 W. Va. 184; *Jeanup v. Carnegie*, 80 N. Y. 441; 36 Am. Rep. 649; *Drinkwater v. Portland Marine Ry.*, 18 Mo. 35; *Brickson v. NeSmith*, 15 Gray, 221; 4 Allen, 233; *Patterson v. Lynde*, 112 Ill. 196. The essence of most of the special remedies is, that a judgment must first be obtained against the corporation, and execution returned unsatisfied before the individual stockholders can be made liable, and it is obvious that, as these prerequisites cannot be satisfied unless by application to the tribunals of the state in which the corporation was created, non-

resident stockholders cannot be reached except through the corporation. A similar result naturally follows where, as in *Brickson v. NeSmith*, 15 Gray, 221, 4 Allen, 233, and *Patterson v. Lynde*, 112 Ill. 196, the remedy prescribed is by bill in equity, to which the corporation is an indispensable party.

In the case of joint stock companies the specification of a procedure may have a very different effect. Thus, where a New York statute provided that no suit could be maintained for a debt of such a company against the individual members thereof, until judgment had been rendered against certain officers in the name of the company, and execution on such judgment returned unsatisfied, it was held in *Taft v. Ward*, 106 Mass. 518, *Gott v. Dinmore*, 111 Mass. 45, that, as the statute had no extraterritorial force, and the members of such a company were, in other states, mere copartners, they might be sued individually in Massachusetts without previously resorting to the statutory procedure.

When Stockholders May be Sued Directly—Suits in Equity.—It is laid down in one case that, if the corporation is actually insolvent, a creditor may under certain circumstances maintain a separate suit against a nonresident stockholder, without first obtaining judgment against the corporation, even though the statute prescribes such judgment and a return of execution unsatisfied as prerequisites to the enforcement of the personal liability of such stockholder: *Aulman's Appeal*, 98 Pa. St. 505. In the latter case the creditor suing was the assignee of all the claims against the corporation, and all the money derived from a sale of its real and personal property had been applied to the indebtedness without satisfying it. The court held that it had full grasp of the whole case, and could make no decree which it was not fully competent to enforce. They were not required, it was said, to settle up the business of a foreign corporation. Nor were they called upon to say how it would be if the case were not so. "The reasons against a court of equity assuming jurisdiction over the affairs of a foreign corporation are certainly very cogent and will have to be maturely considered if such question should hereafter arise. We do not now say that the court ought not in the exercise of a sound discretion to decline to interpose at the suit of some of the creditors against some of the stockholders of such a corporation." The court distinguished the case before it from an earlier one, *Bank of Virginia v. Adam*, 1 Pars. Cas. 534, where it was held that no jurisdiction could be taken of a suit by a creditor to compel the stockholders of a Virginia corporation resident in Pennsylvania to pay their subscriptions, the prerequisite of such a proceeding being the refusal or neglect of the corporation to enforce the subscription. "If stockholders in one state," it was there said, "could be proceeded against, so might they be in every state of the Union of whose jurisdiction English equity formed a part. Such proceedings might even be simultaneous and certainly could not fail to present strange conflicts of decision."

Suits at Law.—In *Flash v. Conn*, 109 U. S. 371, an adjudication that the corporation was bankrupt was held to be a sufficient reason for allowing a creditor to maintain an action at law against a single creditor without first exhausting his remedies against the corporation. The court distinguished the cases in which the statute made each stockholder liable for his proportion of the debts, a form of liability which, it was said, necessitated a resort to equity, from cases like the one under discussion, in which each stockholder was individually liable for the debts of the company to an amount equal to the par value of his stock. "This liability," said Mr. Justice Woods, "is

fixed, and does not depend on the liability of other stockholders. There is no necessity to bring in other stockholders or creditors. Any creditor who has recovered judgment against the company and sued out an execution thereon, which has been returned unsatisfied, may sue any stockholder, and no other creditor can." To the same effect see *Hodgson v. Cheever*, 8 Mo. App. 318; *Paine v. Stewart*, 33 Conn. 516; *Sackett Harbor Bank v. Blake*, 3 Rich. Eq. 225. So also a stockholder who has been compelled to satisfy a creditor may have contribution from another nonresident stockholder in a federal court, even if the principal liability could not have been enforced anywhere except in the state in which the corporation was organized: *Allen v. Fairbanks*, 45 Fed. Rep. 445.

Foreign Courts Will Not Interfere Unless Complete Justice Can Be Done.—It has been stated that one of the reasons which induced the court in *Aulman's Appeal*, 98 Pa. St. 505, to enforce the individual liability of the stockholders of a foreign corporation was that the circumstances were such that it had "a full grasp of the case." The fact that such circumstances do not exist must, on the other hand, be a decisive reason against assuming jurisdiction of a suit for this purpose. In Massachusetts this consideration has been deemed so controlling that the effect of the cases is said, in *Post v. Toledo etc. R. R. Co.*, 144 Mass. 341, 59 Am. Rep. 86, to be that no suit whatever is maintainable in that state to enforce the individual liability of stockholders in foreign corporations. The authorities cited for this doctrine are *Erickson v. Nesmith*, 15 Gray, 221; 4 Allen, 233; *Halsey v. McLean*, 12 Allen, 438; 90 Am. Dec. 157; *Smith v. Mutual L. Ins. Co.*, 14 Allen, 336; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349. In the last case relief was denied where the statute had provided that if a stockholder had not paid up the face value of his stock in full, either in money or in money's worth, he could, upon the insolvency of the corporation, be made personally liable, at the instance of any creditor of the corporation, for the amount remaining unpaid or equitably due, even though the stockholders sued were the sole members of the corporation. The court said: "The liability alleged is one due to the corporation, growing out of the relation of these parties to it as stockholders. The extent of that liability, and the mode in which it shall be enforced, and the position in which the stockholders are placed, must be determined by the laws of Connecticut, and by a tribunal that can control the conduct and action of the corporation. The mere appearance by attorney of the defendant corporation does not enable this court to do so." It is obvious that such reasoning as this leaves no room for the enforcement of personal liability even to the limited extent to which it is conceded in other jurisdictions. Under the circumstances in question, where the stockholders sued constitute the entire corporation, the result of the doctrine propounded is either an entire denial of justice, or, at best, the necessity for two suits where one would have been sufficient. In this respect the case is distinguishable from *Patterson v. Lynde*, 112 Ill. 196, in which it was held that a bill was not maintainable to compel a portion of the stockholders to pay their subscriptions, and satisfy the claim of a creditor of the corporation. "It is simply impossible in this suit," said Scholfield, C. J., "to adjust any equities, because the necessary parties are not, and cannot be, brought before the court. At most, the decree could but affect the unpaid stock of the two defendants, Lynde and Cable. A decree as to the corporation, and as to creditors and stockholders not personally before the court, would be vain and worthless. The necessary account could not be taken, and, if taken, the rights of the parties, as fixed thereby, could not be ascertained." It is to

be noticed, however, that the proper remedy in Oregon, the statute of which was under consideration, had been held to be in equity, and this rendered it absolutely necessary to resort to the domestic tribunal for a remedy. What decision would have been rendered in *Patterson v. Lynde*, 112 Ill. 196, if the personal liability imposed had been of the same general character as that with which the court had to deal in *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349, is not intimated by the court. But the later case, *Young v. Farwell*, 139 Ill. 326, shows a disposition to adopt the views of the Massachusetts court. It was there laid down, as a general principle, that a creditor of an insolvent corporation, organized under the laws of another state, must first seek a remedy in the courts of that state, and there have authoritatively determined the respective relations of creditors and stockholders of the corporation toward the corporation and toward each other, and that then, if it should become necessary, their rights, as respects stockholders, in the foreign state might be enforced in the courts of that state.

Following its previous rulings the Massachusetts court declared in *Bank of North America v. Rindge*, 154 Mass. 203, 26 Am. St. Rep. 240, that a resident of New York cannot maintain an action against a resident of California to establish his personal liability for the debt of a corporation having no place of business in Massachusetts, and organized under the laws of Kansas, providing for special and limited liability of a stockholder, when his liability as such stockholder has not been determined in the latter state. A similar doctrine seems to prevail in New Hampshire also: *Rice v. Hosiery Co.*, 56 N. H. 114. There a creditor of a corporation created under the laws of Ohio filed a bill to enforce the individual liability of the stockholders, who were alleged to be responsible for any debt due by the corporation to any laborer employed by it. It appeared that the corporation before its bankruptcy had removed all its property from the state of New Hampshire, where it had been carrying on a manufacturing business, and that it therefore had no assets for the court to fasten upon; that none of the stockholders were resident in New Hampshire, and that only one of them had property there. Under these circumstances, it was held that comity did not require the court to give effect to the foreign statute. Some stress was laid on the fact that there was no recital in the bill by which the court could be informed by what remedial process the individual liability of stockholders was enforced in Ohio, and that it might happen that, by entertaining the suit, a remedy would be afforded in New Hampshire which was denied to persons in the state in which the corporation was organized. The case is somewhat unsatisfactory, as the actual opinion of the court, supposing the pleadings not to have been defective, is only a matter of inference. The language used, however, is such as to lead to the conclusion that the Massachusetts doctrine would have been followed, *Erickson v. Nesmith*, 15 Gray, 221, 4 Allen, 233, being cited with approbation.

The expressions employed in the opinions in the cases cited in the present subdivision are extremely broad and comprehensive, but possibly it was not intended to deny that jurisdiction might be entertained of this class of suits in any case. Upon general principles, it is difficult to see upon what ground a foreign court would feel itself constrained to refuse the application of a creditor claiming under a statute which gave him a direct remedy against the stockholders, and which could not be interpreted as requiring such remedy to be enforced either through the corporation or against all the stockholders at once. In *Halsey v. McLean*, 12 Allen, 439, 90 Am. Dec. 157, Mr. Justice Foster seemed to lean against the exercise of comity even in

such cases, and referred to the doubts which had been expressed on the subject in *Drinkwater v. Portland Marine Ry.*, 18 Me. 37, but the point was expressly waived as not being involved in the case. The later cases do not deal with a statute imposing this quasi-partnership liability, nor is there any definite intimation by the judges as to what would be their ruling, if such a statute were to come under consideration.

Judgment Against Corporation, When Not Necessary as a Prerequisite to an Action at Law.—A good many cases hold that, if no statutory condition is imposed requiring creditors to proceed first against the corporation, the individual liability of stockholders is regarded as primary; and that an action to enforce the liability is maintainable, without having first obtained a judgment against the corporation, and an execution returned unsatisfied: See note to *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 850-852. Wherever the domestic tribunals have placed this construction upon the statute, it will be adopted in all foreign courts, agreeably to the general rule in such cases: *Aldrich v. Anchor Coal etc. Co.* (Oregon Sup. Ct., April 10, 1893), in which the effect of the California statute came in question.

Foreign Suits in Aid of Proceedings in the Domestic Forum.—The Massachusetts court, although refusing to enforce directly the individual liability of stockholders in a foreign corporation has entertained a bill against the officers of such a corporation for discovery of the names of its stockholders, and of the number of shares held by each, in order that their liability might be enforced in the domestic forum: *Post v. Toledo etc. R. R. Co.*, 144 Mass. 341; 59 Am. Rep. 86.

KEATING v. SPRINGER.

[146 ILLINOIS, 481.]

EASEMENT OF LIGHT—PRESCRIPTION.—The prevalent rule in the United States is, that an easement in the unobstructed passage of light over an adjoining close cannot be acquired by prescription.

EASEMENT OF LIGHT, WHEN NOT IMPLIED FROM GRANT OF LAND.—A grant of the right to the use of light and air is not implied from the conveyance of a house with windows overlooking the land of the grantor; nor, where the owner of two adjacent lots conveys one of them, will a grant of an easement of light and air be implied from the nature and uses of the structure existing on the lot at the time of the conveyance, or from the necessity of such easement to the convenient enjoyment of the property.

EASEMENTS.—THE RIGHT TO HAVE LIGHT AND AIR enter the windows of a building over an adjoining lot may exist by express grant or covenant.

EASEMENT OF LIGHT, GRANT OF, CONSTRUED.—Where a lease contains a provision to the effect that the lessor "shall not build at the rear of the demised premises nearer than twenty-five feet," and that "no obstruction higher than six feet shall be placed in such manner as to obstruct light to said premises," and also refers to "a space in the yard at the rear," as a part of those premises, the true meaning of the words is, that no obstruction of the height specified shall be so placed on any side of the premises as to obstruct the passage of light to the said premises, and not merely that no such obstruction shall be placed in the rear of the premises. Hence in an action for the rent of those premises, in

which the lessee seeks to recoup damages for the lessor's breach of the covenants in the lease, the lessee is entitled to prove, if he can, that a building erected by the lessor not to the rear, but alongside, of the leased premises is so placed as to obstruct the passage of light to any part thereof, including the space in the yard.

LANDLORD AND TENANT—WHAT AMOUNTS TO EVICTION BY LANDLORD.—In order to constitute an eviction, it is not necessary that there should be an actual physical expulsion. Acts of a grave and permanent character, which amount to a clear indication of intention on the landlord's part to deprive the tenant of the enjoyment of the demised premises, amount to an eviction.

LANDLORD AND TENANT—LANDLORD'S RIGHT TO RENT NOT FORFEITED BY WRONGFUL ACT.—The wrongful act of the landlord does not debar him from a recovery of rent, unless the tenant by such act has been deprived in whole, or in part, of the possession, either actually or constructively, or the premises rendered useless.

LANDLORD AND TENANT—TENANT'S RIGHT TO ABANDON, WHEN DEEMED WAIVED.—If the tenant makes no surrender of the possession of the demised premises, but continues to occupy them after the commission of acts on the landlord's part which would have justified him in abandoning them, he will be deemed to have waived his right to abandon; nor, in such case, can he sustain a plea of eviction by showing that there were circumstances which would have justified him in leaving the premises.

LANDLORD AND TENANT—RECOUPMENT OF DAMAGES IN ACTION FOR RENT. Where a lessee has remained in possession of the demised premises after the lessor has so acted that he would be justified in leaving them, and has thus forfeited his right to plead eviction as a bar to an action for the recovery of rent, he may nevertheless, in such an action, recoup against the rent claimed such damages as he may have sustained by reason of the landlord's breach of the covenants in the lease.

JUDGMENT IN FORCIBLE ENTRY AND DETAINER, HOW FAR CONCLUSIVE.—The judgment in a forcible detainer suit, being conclusive only as to the right of possession, and, in a certain class of cases, as to the existence of the relation of landlord and tenant between the parties, and as to the tenant's wrongful holding over, cannot operate as *res adjudicata*, so as to debar the tenant from recouping, in a subsequent action for the recovery of the rent of the demised premises, the damages which he has sustained through the landlord's breach of the covenants in the lease.

ASSUMPT for use and occupation of certain premises in the city of Chicago, described in the case as follows: "All those premises situate . . . in the city of Chicago . . . known and described as follows, to wit: The basement of the building known as Nos. 201, 203, and 205 So. Canal street, Chicago, being a space 50 feet by 70 feet, more or less; also the store floor of part of said building, and known as Nos. 201 and 203 So. Canal street, being a space 50 feet by 50 feet, more or less; also a space in the yard at the rear of said building commencing at the N. W. quarter of said building, then west 25 feet, then south 25 feet, then east 25 feet to

building, together with steam-power not to exceed ten horse-power, said steam-power to be furnished ten hours per day, Sundays and holidays excepted; said premises hereby leased to be used and occupied as a marble works and kindred business, and in no manner as to damage or interfere with tenants of adjoining property." In the lease was the following stipulation: "Party of the first part (Springer) shall not build at the rear of said premises nearer than twenty-five feet, and no obstruction higher than six feet shall be placed in such manner as to obstruct light to said premises; and party of the second part shall at all times have the use and free access through all now existing alleys leading to rear of said premises." The demised building was of two stories and ran back fifty feet from the street, the remainder of the lot being the open space referred to in the lease. There were windows on every side of the house, and at the date of the lease the adjacent land was vacant, the nearest building being about thirty feet distant. In 1885, the year after the lease was executed, the landlord erected a five-story building, the north wall of which was immediately contiguous to the south wall of the leased building. The new building ran back seventy-five feet from the street, overlapping the leased building towards the rear by twenty-five feet. Evidence was also introduced, showing that the landlord had erected boiler and machine shops in the rear of the leased building, and placed various obstructions in the alleys and space to the rear of said building. Besides the suit in assumpsit, the lessor brought suit upon a note alleged to have been given for rent, and instituted three proceedings of distress for rent. The lessee also brought an action on the case to recover damages for the obstruction of his lights by the new building. The special pleas filed to the suit on the note and in the distress proceedings alleged that the covenants in the lease had been violated by the erection of the new building and by the other obstructions above referred to. All the suits were eventually consolidated and tried together. The plaintiff proved that no rent had been paid from October, 1887, to July 17, 1888, and also introduced in evidence, against the objection of the defendant, the record of a judgment in a forcible entry and detainer suit by which the plaintiff was declared to be entitled to the possession of the leased premises. Springer had judgment for two thousand nine hundred and seven dollars and fifty cents against Keating, and, in the action on the case for

the obstruction of Keating's light, Springer was found not guilty.

Hansey and Merrick, for the appellant.

Allan C. Story, for the appellee.

491 **MAGEUDER, J.** In this case many questions of fact and law are discussed by counsel in their briefs, but the record is not in such shape as to authorize us to consider any of these questions, except that which arises out of the refusal of the trial court to admit certain offered evidence, as herein-after stated. The trial was, by agreement, before the court without a jury, and resulted in a judgment for the plaintiff, which has been affirmed by the appellate court. The judgment of the latter court is conclusive as to the findings of fact. No "written propositions to be held as law in the decision of the case" were submitted to the court on the trial below by either side, in accordance with section 42 of the Practice Act; and hence no question of law is presented for our determination, unless the errors assigned as to the admission or exclusion of evidence necessarily involve the consideration of such a question: *First Nat. Bank v. Haskell*, 124 Ill. 587; *Myers v. Union Nat. Bank*, 128 Ill. 478; *Hall v. Cox*, 144 Ill. 532.

The evidence tends to show that a strong light is necessary for such business of manufacturing and polishing marble as appellant was engaged in, and that the demised premises were selected by the appellant for that business, mainly because of their freedom from surrounding obstructions to the supply of light. Accordingly, the defendant below offered to prove that the erection of the Springer building on the south 492 side of the Keating building prevented the entry of light into the latter from the south and west. Upon objection by the plaintiff the court refused to receive the testimony, and an exception was taken to its ruling by the defendant. The action of the trial court was correct, if there is no express covenant or agreement in the lease, obligating the landlord to permit the light to pass over the south lot into the leased premises.

The English doctrine is that, "If one who has a house with windows looking upon his own vacant land sell the same, he may not erect upon his vacant land a structure which shall essentially deprive such house of the light through its windows: Washburn on Easements and Servitudes, page 492,

par. 5. This doctrine, however, does not prevail in the majority of the American states. It is held to be inapplicable in a country like this, where the use, value, and ownership of land are constantly changing. Air and light are the common property of all. The owner of a lot cannot be presumed to have assented to an encroachment thereon, if he has permitted the light and air to pass over it into the windows of his neighbor's house situated upon the adjoining lot. The actual enjoyment of the air and light by the latter is upon his own premises only. The prevalent rule in the United States is that an easement in the unobstructed passage of light over an adjoining close cannot be acquired by prescription: 2 Woodfall's Landlord and Tenant, page 703, and notes; 1 Taylor's Landlord and Tenant, secs. 239, 380, and notes; *Keats v. Hugo*, 115 Mass. 204; 15 Am. Rep. 80; *Mullen v. Stricker*, 19 Ohio St. 135; 2 Am. Rep. 379. In the early case of *Gerber v. Grabel*, 18 Ill. 217, this court held that such a right might be so acquired, but in the later case of *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570, the Gerber case was, in effect, overruled; and it was held that "a prescriptive right, springing up under the narrow limitation in the English law, to prevent obstructions to window lights," . . . "cannot be applied to the growing cities and villages of this country without working the most mischievous consequences, and has never been deemed a part of our law."

402 It is established by the weight of American authority that a grant of the right to the use of light and air will not be implied from the conveyance of a house with windows overlooking the land of a grantor, and that where the owner of two adjacent lots conveys one of them, a grant of an easement for light and air will not be implied from the nature or use of the structure existing on the lot at the time of the conveyance, or from the necessity of such easement to the convenient enjoyment of the property: *Keats v. Hugo*, 115 Mass. 204; 15 Am. Rep. 80; *Mullen v. Stricker*, 19 Ohio St. 135; 2 Am. Rep. 379; 1 Wood's Landlord and Tenant, sec. 209, pp. 422-424, and note; *Morrison v. Marquardt*, 24 Iowa, 35; 92 Am. Dec. 444. "A grant by the owner of two adjoining lots of one of them does not imply the right of an unobstructed passage of light and air over the other": 2 Woodfall's Landlord and Tenant, 703, and note. "The law of implied grants and implied reservations, based upon necessity or use alone, should not be applied to easements for light and air over the

premises of another": *Mullen v. Stricker*, 19 Ohio St. 135; 2 Am. Rep. 379; *Haverstick v. Sipe*, 38 Pa. St. 368; *Keiper v. Klein*, 51 Ind. 316.

It follows that a landlord will not be liable for obstructing his tenant's windows by building on the adjoining close, in the absence of any covenant or agreement in the lease forbidding him to do so: *Myers v. Gemmel*, 10 Barb. 537; *Palmer v. Wetmore*, 2 Sand. 316; *Keiper v. Klein*, 51 Ind. 316; 2 Woodfall's Landlord and Tenant, 703, and note.

But the authorities all agree that the right to have the light and air enter the windows of a building over an adjoining lot may exist by express grant, or by virtue of an express covenant or agreement: *Hilliard v. New York etc. Gas Coal Co.*, 41 Ohio St. 662; 52 Am. Rep. 99; *Brooks v. Reynolds*, 106 Mass. 31; *Keats v. Hugo*, 115 Mass. 204; 15 Am. Rep. 80; *Morrison v. Marquardt*, 24 Iowa, 35; 92 Am. Dec. 444.

The question then arises whether the erection of the Springer building could have been regarded as a violation of the express terms of the lease, if proof had been admitted showing that it obstructed the light necessary to carry on the business. The ⁴⁸⁴ lease contains the following provision: "Party of the first part shall not build at the rear of said premises nearer than twenty-five feet, and no obstruction higher than six feet shall be placed in such manner as to obstruct light to said premises." The meaning of the word "premises," as here used, is not to be restricted to the Keating building alone, but embraces also the space in the rear thereof. The lease speaks of "all those premises . . . described as follows"; and then mentions, as constituting those premises: 1. The basement; 2. The store floor; "also a space in the yard at the rear" twenty-five feet deep. The space in the rear is as much a part of the premises demised as the basement and the store floor. Therefore the appellee agreed that he would not build nearer than twenty-five feet to the west line of the demised space west of the Keating building, which space was twenty-five feet wide from east to west. The Springer building was seventy-five feet deep, while the Keating building was only fifty feet deep. It follows that the extension of the former west of the rear of the latter was south of said space in the yard at the rear. The north wall of the Springer building did not extend further west than the west line of said space in the yard; and consequently the whole of the Springer building was south of the demised premises. Hence,

we think counsel for appellee is right in the contention that no part of that building can be considered as an obstruction placed in the rear or to the west of the premises leased to appellant. But we cannot agree with counsel in so construing the language of the provision as to limit it to obstructions placed in the rear. The landlord does not agree that no obstruction higher than six feet shall be placed in the rear in such manner as to obstruct light to said premises. His agreement is that no obstruction higher than six feet shall be placed, whether to the north or to the west or to the south, in such manner as to obstruct light to said premises; that is, to said space in the rear as well as to said building. The Springer building—a brick structure five stories ⁴⁹⁵ high—was so constructed that its north wall joined the south wall of the Keating building and the south line of the space in the yard at the rear thereof. In view of the express provision in the lease, as above quoted and construed, we are of the opinion that the defendant below was entitled to prove, if he could, that the Springer building was an obstruction placed in such manner as to obstruct light to said premises, and that the trial court should have admitted the proof upon that subject when offered.

It is claimed, however, that the offered evidence was properly rejected because this suit is for rent accruing during a period while the tenant was in possession. In order to constitute an eviction it is not necessary that there should be an actual physical expulsion. Acts of a grave and permanent character, which amount to a clear indication of intention on the landlord's part to deprive the tenant of the enjoyment of the demised premises will constitute an eviction: *Hayner v. Smith*, 63 Ill. 430; 14 Am. Rep. 124. If the acts of the landlord are such as merely tend to diminish the beneficial enjoyment of the premises, the tenant is still bound for the rent if he continues to occupy the premises. Unless he abandons the premises his obligation to pay the rent remains: *Skally v. Shute*, 132 Mass. 367. We said in *Chicago Legal News Co. v. Browns*, 108 Ill. 317: "The rule is well settled that the wrongful act of the landlord does not debar him from a recovery of rent unless the tenant by such act has been deprived in whole or in part of the possession, either actually or constructively, or the premises rendered useless: *Edgerton v. Page*, 20 N. Y. 234; *Nalligan v. Wade*, 21 Ill. 470; 74 Am. Dec. 108; *Leadbeater v. Roth*, 25 Ill. 587."

To evict a tenant, according to the original signification of the word, is to deprive him of the possession of the land. But the landlord, without being guilty of an actual physical disturbance of the tenant's possession, may yet do such acts as will justify or warrant the tenant in leaving the premises. The latter may abandon the premises in consequence of such ~~acts~~ acts, or he may continue to occupy them. If he abandons them, then the circumstances which justify such abandonment, taken in connection with the act of abandonment itself, will support a plea of eviction as against an action for rent. If, however, the tenant makes no surrender of the possession, but continues to occupy the premises after the commission of the acts which would justify him in abandoning them, he will be deemed to have waived his right to abandon, and he cannot sustain a plea of eviction by showing that there were circumstances which would have justified him in leaving the premises. Hence it has been held that there cannot be a constructive eviction without a surrender of possession. It would be unjust to permit the tenant to remain in possession and then escape the payment of rent by pleading a state of facts which, though conferring a right to abandon, had been unaccompanied by the exercise of that right: *Edgerton v. Page*, 20 N. Y. 284; *Boreel v. Lawton*, 90 N. Y. 293; 43 Am. Rep. 170; *De Witt v. Pierson*, 112 Mass. 8; 17 Am. Rep. 58; *Warren v. Wagner*, 75 Ala. 188; 51 Am. Rep. 446; *Wright v. Lattin*, 88 Ill. 293; 1 Taylor's Landlord and Tenant, 8th ed., secs. 380, 381, and notes; 2 Wood's Landlord and Tenant, 2d ed., sec. 477, pp. 1104-1106; *Alger v. Kennedy*, 49 Vt. 109; 24 Am. Rep. 117; *Scott v. Simons*, 54 N. H. 426; *Jackson v. Eddy*, 12 Mo. 209.

But though the tenant will not be allowed to plead eviction as a bar to the recovery of rent, where he has remained in possession after the performance of the acts which would have justified him in leaving the premises, yet he is not for that reason without remedy. In those states where the doctrine of recoupment is recognized, he may recoup such damages as he may have sustained by reason of the acts of the landlord against the rent sought to be recovered: 1 Taylor's Landlord and Tenant, sec. 374; 2 Taylor's Landlord and Tenant, sec. 631; 2 Wood's Landlord and Tenant, sec. 477, p. 1107; *Edgerton v. Page*, 20 N. Y. 284; *Warren v. Wagner*, 75 Ala. 188; 51 Am. Rep. 446. Taylor, in his work on Landlord and Tenant, section 631, says: "By the law of recoupment, as

now established in many of the United States, the tenant can⁴⁸⁷ avail himself, as a defense *pro tanto* to an action of debt for rent, of the landlord's breach of his covenants." The doctrine of recoupment is recognized in this state, and has been applied in proceedings begun by the issuance of distress warrants, and in actions for rent: *Wright v. Lattin*, 38 Ill. 293; *Lindley v. Miller*, 67 Ill. 244; *Lynch v. Baldwin*, 69 Ill. 210; *Pepper v. Rowley*, 73 Ill. 262.

In *Lynch v. Baldwin*, 69 Ill. 210, where the landlord had issued a distress warrant we said: "As to recouping damages for any loss or injury sustained by the tenant, we have no doubt that it may be done, as they grow out of the same transaction. The object of this inquiry is to ascertain the amount of rent due; and if the acts of the landlord impaired the value of the use of the premises, then the tenant should not pay the same rent as if the landlord had done no act to reduce such value."

In *Pepper v. Rowley*, 73 Ill. 262, which was an action to recover rent due under a lease, we said: "If there has been a breach of any covenant contained in the lease, whatever damage appellee has sustained in consequence thereof may be recouped in this action from the amount of rent due under the lease."

In the case at bar, the consolidated proceeding not only includes a suit for rent, but also several proceedings begun by the issuance of distress warrants; and the stipulation permits the defendant to introduce, under the general issue, "any defense and also any setoff, whether matter of contract or tort, that he may have, in the same manner . . . as if specifically pleaded." We therefore think that the offered testimony as to the effect of the erection of the Springer building upon the supply of light should have been received, in order that any damages, which the defendant may have sustained thereby, might be recouped in reduction of the amount of recovery; and that defendant was not precluded from showing such damages by his failure to surrender possession at an earlier date.

⁴⁸⁸ Even if the offered testimony was not admissible as tending to show damages by way of recoupment, it was competent, under the declaration in the action brought by Keating against Springer, to recover damages for cutting off the light by the erection of the Springer building. Under the stipulation, not only were the suits brought by Springer to be tried

together, but also with them was consolidated for trial at the same time the action in case which Keating brought against Springer. It is well settled that, although the omission of the landlord to perform his covenants may not amount to an eviction, nor operate as a bar to his claim for rent, yet the lessee has his remedy by an action to recover damages for a breach of the covenant: *Warren v. Wagner*, 75 Ala. 188; 51 Am. Rep. 446; *Chicago Legal News Co v. Browne*, 103 Ill. 317; *Lounsbury v. Snyder*, 31 N. Y. 514; *Wright v. Lattin*, 38 Ill. 293; *Royce v. Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322; 1 Taylor's Landlord and Tenant, secs. 379, 381, and notes; 2 Wood's Landlord and Tenant, sec. 477, page 1107.

It is furthermore claimed by the appellant, that all the matters set up in defense or as ground of recovery by the defendant in the present consolidated suits were extinguished by the judgment in the forcible detainer suit, and that said judgment operates as *res judicata*, so as to bar all appellant's rights of recovery or recoupment. We are unable to yield our assent to this view. The judgment in forcible entry and detainer is conclusive only as to the right of possession, and, in a certain class of cases, as to the existence of the relation of landlord and tenant between the parties, and as to the tenant's wrongful holding over: *Doty v. Burdick*, 83 Ill. 473; *Norwood v. Kirby*, 70 Ala. 397; *Hodgkins v. Price*, 132 Mass. 196; 8 Am. & Eng. Ency. of Law, 176. It was said, in *Robinson v. Crummer*, 10 Ill. 218, that "damages are not recoverable in this action, but the only judgment for the plaintiff is, that he have restitution of the premises," etc.

For the error committed in the refusal to receive the evidence offered by the defendant as hereinbefore mentioned the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed.

Judgment reversed.

EASEMENT OF LIGHT AND AIR: See generally notes to *Story v. Odin*, 7 Am. Dec. 49-53; *Pierre v. Fernald*, 46 Am. Dec. 573; *Ray v. Sweeney*, 29 Am. Rep. 401. That this easement cannot be acquired by prescription, see *Morrison v. Marquardt*, 24 Iowa, 35; 92 Am. Dec. 444; *Pierre v. Fernald*, 26 Me. 436; 46 Am. Dec. 573; *Guest v. Reynolds*, 68 Ill. 478; 18 Am. Rep. 570; *Klein v. Gehrung*, 25 Tex. Supp. 233; 78 Am. Dec. 565; *Possell v. Sims*, 5 W. Va. 1; 13 Am. Rep. 629; *Keats v. Hugo*, 115 Mass. 204; 15 Am. Rep. 80; *Turner v. Thompson*, 58 Ga. 268; 24 Am. Rep. 497; *Stein v. Hauck*, 56 Ind. 65; 26 Am. Rep. 10; *Ray v. Sweeney*, 14 Bush, 1; 29 Am. Rep. 398; *Lopers v. Lackey*, 23 Kan. 534; 33 Am. Rep. 196; *King v. Miller*, 8 N. J. Eq. 550;

55 Am. Dec. 246; *Mullen v. Stricker*, 19 Ohio St. 135; 2 Am. Rep. 379. In Louisiana the rule is that such an easement cannot be acquired by prescription against the owner of the adjacent land, unless he is able to assert the right to have the lights closed: *Oldstein v. Firemen's B. Assn.*, 44 La. Ann. 492.

EASEMENT OF LIGHT.—GRANT OF, IMPLIED ONLY IN CASES OF REAL NEGOTIATION: *Powell v. Sims*, 5 W. Va. 1; 13 Am. Rep. 629; *Turner v. Thompson*, 58 Ga. 263; 24 Am. Rep. 497; *Rennyson's Appeal*, 94 Pa. St. 147; 39 Am. Rep. 777.

LANDLORD AND TENANT.—EVICTION, WHAT AMOUNTS TO: See generally note to *De Witt v. Pierson*, 17 Am. Rep. 62-64. To constitute an eviction it is not requisite that there should be actual expulsion of the tenant from the premises; it is sufficient if the landlord commits or suffers acts to be committed which make it necessary for the tenant to remove, as where the premises, through his neglect of duty, become untenable: *Tallman v. Murphy*, 120 N. Y. 345; *Alger v. Kennedy*, 49 Vt. 109; 24 Am. Rep. 117. So, where, to the landlord's knowledge, the waters of a well on the premises are so polluted as to render its use unhealthful, and he conceals its condition at the time the lease is executed, the tenant, when he discovers the fact, is justified in abandoning the premises, if the cause of the pollution cannot be removed: *Maywood v. Logan*, 78 Mich. 135; 18 Am. St. Rep. 431. So an act which compels the tenant to stop his business: *Brown v. Holyoke*, 152 Mass. 463; 23 Am. St. Rep. 844; or which renders the demised premises unfit for the purpose for which they were rented amounts to an eviction: *Halligan v. Wade*, 21 Ill. 470; 74 Am. Dec. 108; *Royce v. Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322. This is also the effect of an entry by the landlord, followed by a lease of the premises to other parties: *Engstrom v. Tyler*, 46 Kan. 317; or of an entry followed by sufficient possession to prevent the lessee or those claiming the use of the premises under him from working the leased property: *Pendill v. Hells*, 67 Mich. 657. But an entry without expulsion does not produce a suspension of rent: *Martin v. Martin*, 7 Md. 368; 61 Am. Dec. 364; nor does a mere trespass by the landlord, without any intention of depriving the tenant of the enjoyment of the premises, constitute an eviction: *Hayward v. Ramge*, 33 Neb. 836. A tenant cannot retain the possession of the leased premises and refuse the payment of rent on the ground of a constructive eviction: *Patterson v. Graham*, 140 Ill. 531; nor can the tenant, if he remains in possession of the premises and pays rent therefor, claim that acts of the landlord interfering with his enjoyment of the premises during his occupancy thereof amount to an eviction: *Ralph v. Lomer*, 3 Wash. 401.

FORCIBLE ENTRY AND DETAINER, EFFECT OF JUDGMENT IN.—The ownership of the premises is not at issue in an action for forcible entry and detainer: *Potts v. Magnes*, 17 Col. 364; *Fellon v. Millard*, 81 Cal. 540; *Stillman v. Patis*, 134 Ill. 532. A judgment in such an action decreeing restitution of the premises is, therefore, no bar to a subsequent action in which the plaintiff seeks to determine the ownership, as between him and the party who was awarded such restitution: *Redden v. Tefft*, 48 Kan. 302; nor to any action involving any other question except the right to the immediate possession of the premises: *Deisher v. Gehre*, 45 Kan. 583.

MILLER v. WILSON.

[146 ILLINOIS, 522.]

CONTRACTS—LEX LOCI.—The laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement.

FOREIGN CONTRACTS, PRESUMPTION AS TO VALIDITY OF.—A contract made in another state, or in a foreign country, is presumed to have been made in accordance with the laws of the place of its execution. A violation of those laws, if relied upon as a defense, must be pleaded and proved.

CONTRACTS, ACTIONS ON—STATUTE OF FRAUDS, PLEA OF, HOW CONSTRUED. If the statute of frauds is pleaded as a defense to an action on a contract for the sale of lands situated in another state, but there is no averment that the statute so pleaded is the one in force in that state, the intendment will be that the statute in force in the state where the action is brought is referred to, and the plea is consequently bad.

CONTRACTS—LEX LOCI—STATUTE OF FRAUDS.—If a contract for the sale of lands is valid by the laws of the state where such lands are situated, it will be enforced in another state, even though prohibited by the statute of frauds there in force.

ASSUMPSIT to recover the balance of the purchase price of certain lots in Clay Center, Kansas. In the circuit court the plaintiff had judgment, but it was reversed by the appellate court, the findings of which were as follows:

"1. That the only cause of action on which a recovery is sought by appellee is the breach of an alleged contract of appellant for the purchase of real estate.

"2. We find that such contract was not in writing, and that there was no memorandum or note thereof in writing, signed by appellant.

"3. We find the only memoranda in writing signed by appellant were a letter written on the 24th of October, 1887, and a note written by him on the 23d of January, 1888, and that they were insufficient to charge and render liable the appellant under the statute of frauds; that the said letter is as follows:

"WINDSOR HOTEL, OMAHA, NEB., Oct. 24, 1887.

"Col. M. M. Miller,

"DEAR SIR: Should I take a notion to buy the lot adjoining the three I bought, what would be your lowest price for it? I feel that I paid a pretty good price for the three lots, and would like a back lot if you can let me have it low enough. 120 by 140 is a small farm for \$1,000. Please advise me at Hanover, and oblige,

Yours respectfully,

"R. R. WILSON."

"That the said note is as follows:

"Monday Morning, 6:30, Jan. 23, 1888.

"On account of sickness and disappointment in not having received funds ordered to meet this, Saturday, I forfeit the above \$100, and relinquish all claim in the above lots.

R. R. WILSON.'

"Which note was attached to the following receipt, executed by appellee:

"CLAY CENTER, KAN., Oct. 21, 1887.

"Received of R. R. Wilson \$100 in cash, in consideration of which, and the further payment of \$900 to be paid on or before the 21st of January, 1888, I agree to convey to him, by warranty deed, lots 5, 6, and 7, of block 1, in M. M. Miller's addition to Clay Center, Kansas.

M. M. MILLER.'

"4. We find that the parol evidence in the record was incompetent to connect and aid the said receipt, letter, and note, to make out a valid contract under the statute of frauds, and also insufficient, and we reject the same as evidence."

E. L. Bedford, for the appellant.

W. Spensley, for the appellee.

528 CRAIG, J. Conceding the facts to be as found by the appellate court and recited in its judgment, the question is whether the judgment rendered by that court is one authorized by the facts. The contract sued upon was executed in Kansas. It related to lands in Kansas, and the appellate court reversed the judgment rendered in the circuit court on the contract, on the ground that there was no memorandum signed in writing by the defendant, and that the contract was within the statute of frauds of this state, and hence an action could not be enforced upon it. It will be observed that the statute of frauds of Kansas, where the contract was executed and where the property sold was located, was not pleaded, but the plea of the defendant set up the statute of frauds of this state. It will also be observed that the record contains no evidence whatever that the state of Kansas has enacted a statute of frauds, or that there is any law in that state requiring a contract relating to the sale of lands to be in writing. If, therefore, the contract in question was valid in Kansas (and it must be so 529 held in the absence of a law in that state to the contrary), and is to be controlled by the laws of that state as to its validity, then the judgment of the

appellate court was erroneous. On the other hand, if the contract is to be governed by the laws of this state, where the action was brought upon it, then the decision of the appellate court was correct. The question, therefore, to be determined is, whether the *lex loci contractus* is to control, or whether the contract shall be governed by the *lex fori*.

As a general rule, a contract valid in the state where it is executed may be enforced in another state. Thus, in *Roundtree v. Baker*, 52 Ill. 241, 4 Am. Rep. 597, this court held, where an instrument executed in the state of Kentucky prior to the abolition of slavery for the purchase price of a negro slave sold there, was sued upon in this state, that the contract, being valid and enforceable where it was made, will be enforced in our courts under the law of comity, notwithstanding such a contract could not have originated here, by reason of slavery being prohibited in this state. It is there said: "It is a general rule that we look to the law of the place where the contract is entered into, and not where it is to be enforced, to ascertain its validity. Not only so, but in expounding its terms and conditions." Sutherland on Statutory Construction, section 471, says: "The laws which exist at the time and place of the making of a contract determine its validity, construction, discharge, and measure of efficacy of its enforcement. A statute of frauds embracing a pre-existing parol contract not before required to be in writing would affect its validity."

It is a familiar rule that the laws existing at the time and place of the execution of a contract enter into and form a part of the contract. Thus, in *Edwards v. Kearsey*, 96 U. S. 595, it is said: "It is the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces ⁵²⁰ alike those which affect its validity, construction, discharge, and enforcement."

A very interesting case on this subject is *Cochran v. Ward*, 5 Ind. App. 89, and as the opinion in that case refers to and quotes from a number of authorities, we quote from the language of the opinion: "In the case of *Low v. Andrews*, 1 Story, 38, it was held that a contract for the sale of goods in France if valid there, would be enforced in this country, though within the statute of frauds here. In *Scudder v. Union Nat. Bank*, 91 U. S. 406, it was held that in an action upon the parol

acceptance of a bill of exchange to be performed in Missouri, the statute of frauds of the place of the contract should control, as it affected the formality necessary to create a legal obligation. The case of *Kling v. Fries*, 38 Mich. 277, was an action in Michigan upon a contract for the sale of goods in Ohio; it was held that the Ohio statute of frauds applied. The case of *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331, was an action in Missouri upon a contract for the sale of wheat to be delivered in the state of Illinois; it was decided that the Illinois statute of frauds obtained. The case of *Anderson v. May*, 10 Heisk. 84, was an action in Tennessee upon a lease for lands in Arkansas; the court decided that the statute of frauds of the latter state should be allowed to control the contract. *Denny v. Williams*, 5 Allen, 1, was an action in Massachusetts upon a contract for the sale of wool in New York, and the defendant set up the New York statute of frauds. The court held the answer good, saying: 'As the contract was made in the city of New York, and was to be performed there, the laws of the state of New York must govern us in respect to its construction and performance.' The supreme court of Louisiana, in *Vidal v. Thompson*, 11 Mart. (La.) 23, said: 'An instrument, as to its form and the formalities attending its execution, must be tested by the law of the place where it was made.' In *Pickering v. Fisk*, 6 Vt. 102, the court used this language: 'As to the requisites of a valid contract, the mode ⁵³¹ of authentication, the forms and ceremonies required, and, in general, everything which is necessary to perfect or consummate the contract, the *lex loci contractus* governs, though, with respect to coveyances or other contracts relating to real estate, the statutory regulations of the place where such estate is situated must be observed.'"

As observed before, the contract involved was executed in Kansas, related to property in that state, and was to be performed in Kansas. Under the authorities cited, the laws of Kansas entered into and formed a part of the contract, and if the contract was valid in that state, although it may be prohibited by our statute of frauds, our courts, under the doctrine of comity, in an action on the contract, could do no less than enforce it. If the laws of Kansas rendered the contract void or voidable, for the reason that it related to lands and was not in writing, that was a matter the defendant was bound to plead and prove. As was held in *Smith v. Whitaker*, 23 Ill. 367, a contract made in another state or in a foreign

country will be presumed to be made in accordance with the laws of the place of its execution, and a violation of those laws, if relied on as a defense, must be pleaded and proved. Here the defendant interposed a plea of the statute of frauds, but did not set up that it was the law of or a statute in Kansas. In the absence of an averment that the statute was one of another state, we will presume it was the statute of our own state. But if the defendant had pleaded the statute of Kansas he would occupy no better position, for the reason that no proof whatever was introduced tending to show what the statute or law of Kansas was.

From what has been said, if we are correct, our statute of frauds, relied upon by defendant, was no defense. The judgment of the appellate court will be reversed, and the judgment of the circuit court will be affirmed.

Judgment reversed.

CONTRACTS.—LEX LOCI REX SIT. GOVERNS if the contract relates to realty: *Ivey v. Lalland*, 42 Miss. 444; 97 Am. Dec. 475; *Richardson v. De Gierville*, 107 Mo. 422; 28 Am. St. Rep. 436, and note; an exception to the rule being where a contract is made in one state for a loan of money, to be secured by a conveyance of land in another state. In such a case the contract is to be governed as to its nature, validity, and construction by the laws of the former state: *Klueck v. Price*, 4 W. Va. 1; 6 Am. Rep. 268; *Lockwood v. Mitchell*, 7 Ohio St. 387; 70 Am. Dec. 78.

CONTRACTS.—LEX LOCI CONTRACTUS.—The only exceptions to the rule that the validity and obligation of a contract, and the capacity of parties thereto are to be determined by the *lex loci contractus*, and will be enforced in other states, when their effect is ascertained by reference to that law, is that the courts of a foreign state refuse to recognize any contract which is hurtful to its own citizens or *contra bonos mores*: *Robinson v. Queen*, 87 Tenn. 445; 10 Am. St. Rep. 690, and cases cited in note.

CONTRACTS MADE WITH REFERENCE TO FOREIGN LAWS, PRESUMPTION IN FAVOR OF VALIDITY OF: See *Wheeler v. Constantine*, 39 Mich. 62; 33 Am. Rep. 355, where it was held that a note valid in one state is, in an action in that state, presumed to be valid in another state, and that, if a woman domiciled in the latter state pleads her disqualification to make the note, she must support her plea by proof of the laws imposing such disqualification.

LIBBY v. SCHERMAN.

[146 ILLINOIS, 540.]

MASTER AND SERVANT—PLEADING IN ACTION AGAINST CORPORATION.—

The declaration in an action in which a corporation is sued by one of its servants for negligence need not show affirmatively by express averments that the injury complained of was caused by the negligent acts of agents or servants of the defendant, who were not fellow-servants of the plaintiff. It is enough to allege that the defendant, that is, the corporation itself, negligently did the acts complained of. Such an allegation excludes, *ex vi termini*, the theory that they were performed by parties for whose conduct the defendant was not responsible.

PLEADING—VARIANCE, HOW PRESENTED AS QUESTION OF LAW.—To present the question of variance as one of law, the evidence should be objected to on that ground at the time it is offered, or when the variance becomes apparent, counsel should move to exclude the evidence, or in some other appropriate way the question should be so raised that the trial judge can pass upon it; and to properly raise the question in any of these modes the variance should be distinctly pointed out, so as to enable the trial judge to pass upon it understandingly, and to enable the plaintiff, if such course should become necessary, to obviate the objection by an amendment to the declaration.

WITNESSES—EVIDENCE OF OPINIONS BASED ON EXPERIMENTS.—In an action by the defendant's servant to recover damages for personal injuries caused by the fall of a pile of barrels, which the plaintiff alleges to have been the result of removing the contents of one of the barrels, and thus diminishing the stability of the pile, it is not error to refuse to allow the defendant's foreman and timekeeper to give evidence of experiments which they have made with a similar pile, from which a barrel placed like the one in question was altogether taken away without causing the pile to fall, nor to exclude the opinions of these witnesses as to whether the stability of such a pile would be affected by taking an empty barrel entirely out of it, or by knocking off the head of a barrel so located and removing its contents.

MASTER AND SERVANT—VICE-PRINCIPAL, WHO IS.—One who has charge of other servants, and has authority to govern and direct their movements in the branch of the principal's business in which they are engaged is, while acting in pursuance of and within the scope of such authority, the vice-principal, so as to make his acts and directions the acts and directions of the principal.

MASTER AND SERVANT—DUTY OF MASTER TO PROVIDE SAFE PLACE FOR WORK.—When the declaration in an action by the defendant's servant to recover damages for personal injuries caused by the fall of a row of barrels near which the plaintiff was working avers in substance that it was the defendant's duty to maintain that row in such a condition that the barrels would not fall, and that the defendant so carelessly maintained the said row of barrels that they spread, tilted, and fell upon the plaintiff, the gist of the action is the failure of the defendant to discharge the duty incumbent upon every employer to furnish his employee with a reasonably safe place in which to work, and therefore the defendant cannot complain of an instruction which states that duty correctly, on the ground that it is not applicable to any issue in the case.

MASTER AND SERVANT—ASSUMPTION OF RISKS.—Where the material question in an action by an employee to recover damages for personal injuries received in the course of his employment is, whether he has assumed the risk of the particular peril which has caused his injuries, and the defendant has requested the court to charge the jury that "where an employment is attended with danger, a servant engaging in it assumes hazard of ordinary perils which are incident to it, and if he receives an injury from an accident which is an ordinary peril of the service undertaken by him he cannot recover damages for the injury," it is proper before giving such instruction to modify it by the addition of the clause, "but this applies only to perils or risks ordinarily incident to the service, and not to those which are extraordinary, and which did not exist at the time the servant engaged in the master's business, and which the servant did not subsequently assume." Without such modification the instruction asked for can have no application to the supposed facts, except upon the assumption that the particular peril in question was one of the ordinary perils incident to the service, and it is therefore misleading unless the rule which should govern in case that peril is decided not to be an ordinary one is also given to the jury.

ACTION to recover damages for personal injuries received while the plaintiff was engaged in piling barrels in the defendant's packing-house. On the afternoon of the day before the accident the defendant's foreman noticed that a barrel on the second tier was leaking. As the row in which it was placed was already five barrels high, and considerable time would be occupied in tearing down the pile so as to take out the leaking barrel, the foreman had the head knocked in and the contents removed. The evidence tended to show that after this was done the foreman said in the hearing of the plaintiff: "Now everything is all right; go ahead to work." The next morning, while the plaintiff and his fellow-workman were engaged in piling the barrels, at a point directly opposite the empty barrel, the barrels on the top of the two rows next to that on which they were working fell and struck the plaintiff, breaking his right leg just above the ankle.

Weigley, Bulkley, and Gray, for the appellant.

Gibbons, Kavanagh, and O'Donnell, for the appellee.

⁵⁴⁷ **BAILEY, C. J.** The first proposition submitted by counsel for the defendant is, that the declaration does not state a cause of action, and that its motion in arrest of judgment should have been sustained on **that** ground. The contention is, that the defendant, being a corporation, could act only by its agents and servants, ⁵⁴⁸ and that as the maxim *respondet superior* has no application to injuries resulting from the negligent acts of the fellow-servants of the plaintiff, the declara-

tion must show affirmatively, by express averments, that the injury complained of was caused by the negligent acts of agents or servants of the defendant who were not fellow-servants of the plaintiff. This, in our opinion, was not necessary. The allegations of the declaration, so far as this point is concerned, are in the form which has been universally recognized by the rules of common-law pleading as sufficient to charge a corporation with negligence. They are that the defendant, that is, the corporation itself, negligently did the acts complained of, allegations which exclude, *ex vi termini*, the theory that they were performed by parties for whose conduct the defendant was not responsible.

Counsel refer in support of their contention to the recent case of *Joliet Steel Co. v. Shields*, 134 Ill. 209. Upon examination of that case it will be found that the negligent acts complained of were there affirmatively alleged to have been done by the defendant's servants, without showing that they were done by the class of servants whose acts would charge the principal with responsibility. It was held that such allegations were not sufficient to show a right to recover against the principal. The distinction between that case and this is clear. It should also be noticed that in that case the ordinary presumptions which obtain after verdict, and by operation of which a defective statement of a good cause of action is said to be cured, were excluded by an instruction given by the court to the jury. In this case no such instruction was given, so that even if the declaration is one which might have been held to be defective on demurrer, the defect is one which is cured by verdict.

Counsel on both sides have filed in this court the same printed briefs and arguments prepared and used by them in the appellate court, and in which much space is devoted to the discussion of questions which are not open for consideration ⁵⁴⁹ here. Among other things, it is urged on behalf of the defendant that the evidence does not accord with the declaration, and that it does not sustain the verdict and judgment. These propositions present mere questions of fact, or at most mixed questions of law and fact, as to which the judgment of the appellate court is conclusive.

The point made that the evidence varies from the declaration, as we understand it, does not assume that there was no evidence tending to prove the allegations of the declaration as made, but that the negligence proved by the preponder-

ance of the evidence differs in its character and circumstances from that alleged. The proposition stated in this form manifestly presents a mere question of fact which this court cannot review. To present the question of variance as one of law, the evidence should have been objected to at the time it was offered on that ground; or when the variance became apparent counsel should have moved to exclude the evidence, or in some other appropriate way the question should have been so raised that the trial judge could have passed upon it; and to properly raise the question in any of these modes the variance should have been distinctly pointed out, so as to enable the trial judge to pass upon it understandingly and to enable the plaintiff, if such course should become necessary, to obviate the objection by an amendment to the declaration. In none of these ways was the objection raised. It is true that one of the grounds assigned by the defendant in its motion for a new trial was in these words: "There is a variance between the declaration and the proof," but even there the variance was not pointed out. This was not sufficient. It was not incumbent upon the trial judge, upon such challenge, to grope through the record in an endeavor to discover a variance, but it was the duty of the defendant's counsel, if one existed, to point it out and call attention to it specifically, and having failed so to do, he must be deemed to have waived the objection.

550 The defendant called Morgenweck, its foreman, and Haddlesey, its timekeeper and paymaster, as witnesses, and sought to prove by them experiments with piles of barrels similar to the one from which the barrels fell upon the plaintiff, and from which a barrel located relatively the same as the empty barrel in question was entirely taken out without causing the pile to fall. These witnesses were also asked whether an empty barrel located as was the one in question could be taken out of the pile without causing it to fall or give way, or whether knocking out the head of the barrel thus situated and, removing its contents, would affect the stability of the pile. This evidence was excluded by the court, and an exception to such ruling was preserved by the defendant.

We are clearly of the opinion that experiments of that character, and their results, and inferences drawn from them by witnesses, were mere collateral matters which could have no legitimate bearing upon the issues before the jury. Besides the impossibility of showing that the conditions under which

these experiments were made were in all respects identical with those existing at the time the plaintiff was injured, and the multitude of collateral issues which an attempt to prove identity of conditions would raise, the fact that one experiment had been conducted to a successful issue would have little if any tendency to show that, in another case precisely like it, an accident might not happen. A thousand men may pass an impending wall with safety, or at least without injury, but the next man who attempts to pass it may be crushed by its fall. The question is not whether a pile of barrels might not stand with an empty barrel situated as was the one in this case, but whether leaving such barrel in the condition shown rendered the support of the barrels above it less secure, and that to such a degree as to constitute negligence, and whether the plaintiff's injury occurred as the result of such negligence.

So far as these witnesses were sought to be examined as experts, it does not appear that they had any special knowledge ⁵⁵¹ or skill on the subject, unless it was that gained by means of the experiments which counsel attempted but was not permitted to prove. Nothing therefore is proved which tends to show that they were any better qualified to express an opinion on the subject than were any of the jurors before whom the cause was being tried. And even admitting that the subject was one for expert testimony—a proposition which may well be doubted—their answers to questions put to them calling for their opinions, would obviously have been merely a means of getting before the jury by indirection the results of the experiments, if not the experiments themselves.

Numerous errors are assigned upon the rulings of the court in the instructions to the jury, only a portion of which, however, seem to us to be of sufficient importance to require extended discussion. The first instruction given at the instance of the plaintiff held, that if Morgenweck was in the defendant's employ, and authorized to take charge and control of a gang of men of whom the plaintiff was one in rolling and piling barrels of meat, and to govern and direct their movements in the branch of the defendant's business in which they were engaged, then, while acting in pursuance of and within the scope of such authority, he was the direct representative of the defendants, and his acts and directions, within the scope of his authority, were the acts and directions of the defendant; but if he was not so authorized, his acts and directions were

not those of the defendant, and his negligence, if any, was not the negligence of the defendant.

This instruction does not attempt to lay down the law as to fellow-servants, as counsel assume, but merely to state the rule governing the responsibility of a master for the acts and directions of a vice-principal. It holds that one who has charge and control of other servants, and has authority to govern and direct their movements in the branch of the principal's business in which they are engaged, is, while acting in pursuance of and within the scope of such authority, a vice-principal ⁵⁵² so as to make his acts and directions the acts and directions of the principal; but that if he has no such authority his acts, directions, and negligence are not those of the principal. It must be admitted that the last part of the instruction is scarcely accurate as a general proposition, since many servants who have no control over other servants may so represent their principal as to render the latter responsible for their acts and negligences. Such would be the case with all servants not standing in the relation of fellow-servants to the plaintiff, but in this respect the instruction is manifestly more favorable to the defendant than the law warrants, and is therefore no ground for just complaint on its part. In other respects the instruction seems to us to state the law correctly. It may be that some of the acts of Morgenweck, as shown by the evidence, were not within the scope of his authority over the other servants of the defendant, or that as to such acts he even assumed the position of a fellow-servant with the complainant, but there is nothing in the instruction from which the jury could have been led to suppose that as to those acts he was to be regarded as a vice-principal, but rather the contrary.

Complaint is made of the plaintiff's fourth instruction, which was as follows:

"It was the duty of the defendant in this case to have used ordinary care and prudence in furnishing to the plaintiff, at the time of the accident, a reasonably safe place in which to work, and to have used all reasonable precautions to maintain and keep such place in a reasonably safe condition."

It is not claimed that this instruction does not state a correct proposition of law, but only that it is applicable to no issue in the case. In this we think the counsel are mistaken. The declaration avers that the plaintiff, at the time he was injured, was working for the defendant near the row of bar-

rels in question, and that it was the defendant's duty to keep and maintain such row of barrels in such condition that they ⁵⁵³ would not spread, tilt, or fall upon the plaintiff while working near the same, yet the defendant, in disregard of his duty, carelessly and negligently kept and maintained the row of barrels defectively piled, and, when so piled, drove in the head of one of the barrels and removed the contents thereof, so that the barrel was greatly weakened and rendered unable to support the weight of the barrels piled above it, by means whereof the barrels spread, tilted, and fell upon the plaintiff and injured him.

The duty which is here alleged is the common-law duty incumbent upon every employer, and which he cannot delegate to others in such manner as to relieve himself from the consequences of its nonperformance, to furnish to his employee a reasonably safe place in which to work, and to use proper diligence to keep such place in a reasonably safe condition, and the negligence charged is merely a breach of that duty. The failure of the defendant to keep the place assigned to the plaintiff for the performance of his work in a safe condition is of the very gist of the action, and we think, therefore, that the instruction above quoted was directly applicable to the main issue submitted by the pleadings.

The third instruction asked by the defendant was modified by the court by adding thereto the words in italics, and was given to the jury thus modified. That instruction was as follows:

"The jury are instructed that, where an employment is attended with danger, a servant engaging in it assumes the hazard of ordinary perils which are incident to it, and if he receives an injury from an accident which is an ordinary peril of the service undertaken by him he cannot recover damages for the injury; *but this applies only to perils or risks ordinarily incident to the service, and not to those which are extraordinary, and which did not exist at the time the servant engaged in the master's business, and which the servant did not subsequently assume.*"

Several other instructions asked by the defendant were modified in substantially the same way. We think there ⁵⁵⁴ was no error in the modification. The instruction, as asked, though announcing a proposition of law which is abstractly correct, yet, when applied to the facts of this case, was likely to mislead the jury. The material question in the case was

not, whether the plaintiff had assumed the risk of other perils incident to the service in which he was engaged, but whether he had assumed the risk of the particular peril which caused his injury, viz., that arising from leaving an empty barrel of the character of the one in question, with the head knocked out, near the bottom of the pile, and thus weakening the pile and causing the barrels above it to fall. Other perils incident to the service were wholly immaterial. The instruction as asked then had no application to the case before the jury, except upon the assumption that the particular peril in question was one of the ordinary perils incident to the service, and, standing alone, it would have been likely to convey that assumption to the jury. To render it applicable to the case, so as not to be misleading, it should have submitted to the jury the question whether that peril was, in point of fact, one of the ordinary perils of the service, and then laid down the rule applicable in case that question should be decided in the affirmative, or it should have been modified, as was done, so as to lay down the rule which should govern in case of its negative decision.

As to the remaining criticisms upon the rulings of the court in the instructions to the jury, all we need say is, that we have examined them all with care, and fail to find that in any of them any substantial error is pointed out. So far as we can see, no useful purpose would be subserved by prolonging this opinion in discussing them.

It is urged that the court erred in rendering judgment for five thousand dollars, after finding that the damages awarded by the jury were excessive, and requiring the plaintiff to remit two thousand five hundred dollars from the amount awarded, under penalty of setting the verdict aside and granting a new trial. The practice of requiring ⁵⁵⁵ the plaintiff to remit a portion of his damages and rendering judgment for the residue, where there is no ground for a new trial except that the damages awarded by the jury are excessive, is so well established in this state that it cannot now be successfully called in question.

We find no material error in the record, and the judgment of the appellate court will accordingly be affirmed.

Judgment affirmed.

MASTER AND SERVANT—VICE-PRINCIPAL—WHO IS.—Where a master gives to his servant the power to superintend, control, and direct other servants engaged in the performance of a work, such servant is a vice-principal, and

the master is liable for his negligence: *Miller v. Missouri Pac. Ry. Co.*, 109 Mo. 350; 32 Am. St. Rep. 673, and note; *Colorado etc. Ry. Co. v. Naylor*, 17 Col. 501; 31 Am. St. Rep. 335, and note; *Orman v. Mannix*, 17 Col. 564; 33 Am. St. Rep. 340, and note. See also the extended note to *Adams v. Iron Cliffs Co.*, 18 Am. St. Rep. 455-458, also the note to *McElligott v. Randolph*, 29 Am. St. Rep. 189.

MASTER AND SERVANT—MASTER'S DUTY TO FURNISH SAFE PLACE TO WORK.—A master undertakes the duty toward an employee of exercising reasonable care and diligence to provide the employee with a reasonably safe place to work: *Parkinson Sugar Co. v. Riley*, 50 Kan. 401; 34 Am. St. Rep. 123, and note; *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475; 30 Am. St. Rep. 745; *McElligott v. Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181, and note.

MASTER AND SERVANT—RISKS ASSUMED BY SERVANT.—An employee when he enters the service of a master, assumes all ordinary hazards incident to such service, and also other perils of which he has knowledge: *Parkinson Sugar Co. v. Riley*, 50 Kan. 401; 34 Am. St. Rep. 123, and note; *Kehler v. Schwank*, 151 Pa. St. 506; 31 Am. St. Rep. 777; *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475; 30 Am. St. Rep. 745, and note with the cases collected.

VARIANCE between a pleading and an instrument offered in evidence thereunder cannot be urged for the first time on appeal: *Richelieu Hotel Co. v. International etc. Encampment Co.*, 140 Ill. 248; 33 Am. St. Rep. 234.

EDWARDS v. DILLON.

[167 ILLINOIS, 14.]

PARTNERSHIP—POWER OF PARTNER TO BIND FIRM BY CONTRACT UNDER SEAL.—If one partner executes an instrument under seal in the name of the firm, it is binding upon the firm when an express or implied authority or confirmation can be justly established, though not under seal, whether it be verbal or in writing, or circumstantial. The prior assent or subsequent ratification may not only be by parol, but may be implied from declarations or from acts and circumstances, or from other evidence tending to show assent or ratification.

PARTNERSHIP—CONTRACTS—WHEN SEAL MAY BE DISREGARDED.—If an instrument executed by one partner in the firm name under seal is valid without a seal, and within the scope of the partnership business, and within the powers belonging to each partner, the seal may be disregarded, and the instrument ratified as a simple contract of the firm.

PARTNERSHIP—CONTRACT UNDER SEAL AS EVIDENCE.—In the simple transfer of personal property, the addition of a seal to the writing neither adds to, nor detracts from, the effect of the transfer, and if the writing is signed and sealed in the firm name by one partner, it is not thereby rendered inadmissible in evidence against the other partners.

PARTNERSHIP—CONTRACTS BY PARTNER UNDER SEAL—WHEN SEAL MAY BE DISREGARDED.—When the covenants or obligations in a bill of sale of personality, as well as the transfer of the property itself, are within the ordinary scope of the partnership business, and within the powers

of each individual partner, the nonexecuting partners are not relieved from liability upon such obligations by the mere fact that the partner signing the firm name affixes a seal.

PARTNERSHIP—POWER OF PARTNER TO SELL AND WARRANT.—When each partner in a firm dealing in stallions has power to sell, he also has the further power to warrant the quality of the horse sold as to its fitness for the purpose for which it is sold.

PARTNERSHIP—PARTNER AS GENERAL AGENT OF THE FIRM.—Each partner is the general agent of his copartners as to the firm business, and the members of the firm are considered as sanctioning the contract which they singly enter into.

AGENCY—POWER OF GENERAL AGENT TO WARRANT.—A general agent employed to carry on a business with power to sell also has power to warrant, if it is usual to give a warranty when making a sale in such business.

AGENCY—POWER OF AGENT TO WARRANT.—A general agent employed to carry on the business of horse-dealing for his employer has implied authority to warrant soundness when selling a horse.

SALES—IMPLIED WARRANTY.—A dealer contracting to sell an article in which he deals, to be applied to a particular purpose, the buyer necessarily trusting to the judgment of the dealer, impliedly warrants that it is fit for the purpose to which it is to be applied.

Oscar C. Torrison, Kerrick, Lucas and Spencer, for the appellant.

Fifer and Phillips, for the appellee.

18 MAGRUDER, J. This is an action of *assumpsit* brought by the appellant against the appellee upon the following sealed instrument:

"THIS IS TO CERTIFY that Levi Dillon and Sons have this day sold to *B. Edwards of Chicago, Ill.*, the imported Norman stallion, *Cambrone*, for the sum of eighteen hundred dollars. We warrant the said stallion sound and healthy, but assume no responsibility on account of disease or accident after this date. We guarantee that the said stallion, with proper handling, shall prove to be an average foal-getter. In case the said stallion shall fail to get colts, we agree to exchange him for a stallion of equal merits, and to pay half the expense incurred in making said exchange. Said stallion shall have a fair trial of two years before being condemned as a breeder. *Cambrone* was foaled in France in 1880, and imported to the United States by Dillon Brothers in 1883. *Cambrone* is recorded in the National Register of Norman Horses, No. 2081.

"In witness whereof, we have hereunto set our hands and seal this thirtieth day of January, 1884.

"LEVI DILLON AND SONS." [SEAL]

All of the foregoing instrument was a part of the printed form hereinafter referred to, except the signature to said instrument, and those words thereof which are italicized. The declaration avers breaches of the warranty and guarantee set forth in the certificate.

The defendant, Levi Dillon, pleaded in abatement the non-joinder of his four partners, setting up that the alleged promises, ¹⁹ if any, were made by the firm of "Levi Dillon and Sons," composed of Levi Dillon, John Harding, James Railsback, Ellis Dillon, and James C. Duncan, and that the horse in question, at the time of the sale, was the property of the firm, and not of Levi Dillon alone. The plaintiff did not amend his declaration by making new parties, but filed his replication joining an issue of fact on the plea. In the circuit court there was a trial by jury, and verdict and judgment were in favor of the defendant, which judgment has been affirmed by the appellate court.

It is admitted that the signature to the contract, "Levi Dillon and Sons," was made by Levi Dillon alone. The issue tried below was whether or not the contract was the contract of Levi Dillon and Sons, or of Levi Dillon alone. The jury found it to be the contract of the firm, and the judgment of the appellate court is conclusive of the question of fact.

But it is urged by appellant that the court erred in allowing the defendant to introduce, over plaintiff's objection, oral proof of the partnership, upon the alleged ground that the contract sued on was under seal, and that Levi Dillon had no power to sign a sealed instrument for the firm, and that, therefore, under the law, the signature was that of Levi Dillon alone, and that he alone was liable. The same question presented by the objections to evidence arises upon the instructions. It is assigned as error that the court refused to instruct the jury, at plaintiff's request, that, "in order to bind the partners by signing and sealing the contract in question in the firm name of Levi Dillon and Sons, the defendant must have had express authority from each one of his partners to execute the contract under seal."

At common law one partner could not bind the others by an instrument under seal unless they gave him express authority under their seals. In harmony with this rule it has been held that where one partner executes an instrument under seal in the firm name without authority under seal he ²⁰ alone is bound by it: Story on Partnership, 7th ed., sec.

117, 119; 1 Bates' Law of Partnership, sec. 421. The general weight of authority is undoubtedly in favor of the position that one partner has no implied power to bind the firm by an instrument under seal: 17 Am. & Eng. Ency. of Law, 1001, and cases in notes. But the American courts have been inclined to depart from the harshness of the common-law rule. They hold to the doctrine that where one partner executes an instrument under seal in the name of the firm it will be regarded as binding upon the firm, "where an express or implied authority or confirmation could be justly established, not under seal, whether it be verbal, or in writing, or circumstantial": Story on Partnership, 7th ed., secs. 121, 122. The prior assent or subsequent ratification may not only be by parol, but may be implied from declarations, or from acts and circumstances: 1 Bates on Law of Partnership, sec. 416; Parsons on Partnership, 181, and notes; *Gram v. Seton*, 1 Hall, 262; *Cady v. Shepherd*, 11 Pick. 400; 22 Am. Dec. 379; 17 Am. & Eng. Ency. of Law, 1002, and cases in note 4.

In *Eames v. Preston*, 20 Ill. 389, the question was whether the action of *assumpsit* could be maintained upon a certain note therein set forth which was executed by a firm. Inasmuch as the note was held to be under the seal either of the firm or of the partner signing it it followed that suit in *assumpsit* would not lie upon it under the statute as it then existed. The material inquiry in that case was, not so much whether one partner had authority to execute an instrument under seal in the name of the firm, as whether the instrument there under consideration was or was not a sealed instrument. Under section 19 of the present Practice Act *assumpsit* may be maintained upon sealed instruments. That section has abolished the distinction between sealed and unsealed instruments as to the form of action: *Harms v. McCormick*, 132 Ill. 104. In *Peine v. Weber*, 47 Ill. 41, we said: "We think it may be safely said the modern rule is, that one partner may, ²¹ in furtherance of the partnership business and for its benefit, execute a deed under seal, which will be binding on the other, if he has foreknowledge, or subsequently ratifies it, and this may be proved by acts and circumstances, or by his verbal declarations and admissions." Under the American doctrine the liability of the partners will not be confined to the one who signs the sealed instrument in the name of the firm, if it appear that the prior assent or subsequent ratification of the other partners can be implied from their

acts and declarations, or from other proper evidence tending to show such assent or ratification: *Wilcox v. Dodge*, 12 Ill. App. 517; *Walsh v. Lennon*, 98 Ill. 27; 38 Am. Rep. 75.

There is evidence in the present record tending to show, that the act of Levi Dillon in signing the firm name of "Levi Dillon and Sons" to the instrument sued upon in this case was done with the previous assent of the other partners. The firm was engaged in the business of importing and selling Norman horses. They prepared a bound book, containing blank forms of certificates of sale with warranties, of which the foregoing certificate, except the signature and italicized words, is a sample. These certificates with their warranties were intended to be those of the firm, because the name of the firm is printed in the body of them, and were intended to be under seal, because each has, to the right of the signature line, a scroll with the word "seal" printed in it. The firm adopted and used this blank form, giving therein written guaranties; all the members knew of the form; the firm gave fifty or seventy-five certificates drawn according to this form, with the seal attached; when a sale was made, one copy would be kept and a duplicate given to the purchaser; all the members of the firm had access to the bound book of forms; the other members, as well as appellee, would fill up the certificates, and write the guaranties in them when horses were sold, and sign the firm name thereto opposite the seal, though the business was generally transacted by appellee.

²³ But even if it were true, that the evidence does not show acts and circumstances from which the assent of the other partners may be implied, we do not think that the instrument here sued upon was necessarily one which was required to be under seal. While one partner cannot bind his copartners by deed, yet if the instrument executed by him, though under seal, would have been valid without a seal, and within the scope of the partnership business, and within the powers belonging to each partner, then the seal may be disregarded, and the instrument may be ratified as a simple contract: *Walsh v. Lennon*, 98 Ill. 27; 38 Am. Rep. 75; *Mecham on Agency*, sec. 141; *Story on Partnership*, 7th ed., sec. 122; *Sterling v. Bock*, 40 Minn. 11; *Human v. Cuniffe*, 32 Mo. 316; *Robinson v. Crowder*, 4 McCord, 519; 17 Am. Dec. 762; *Deckard v. Case*, 5 Watts, 22; 30 Am. Dec. 287. In other words, "the mere addition of a seal to a contract within the ordinary scope of the business, which requires none, does not vitiate

the contract": 17 Am. & Eng. Ency. of Law, 1004, and cases in note 1. This doctrine is conceded to be applicable to the instrument upon which the present suit is brought, so far as that instrument is a mere bill of sale. Where there is a simple transfer of personal property the addition of a seal neither adds to, or detracts from, the effect of the transfer; and consequently, if it is signed and sealed in the firm name by one partner it is not thereby rendered inadmissible in evidence against the other partners. But it is said, that the addition of the seal to the firm name by the signing partner makes the instrument inadmissible against the other partners, so far as the warranties or guaranties contained in it are concerned.

There are some authorities which hold that an unnecessary seal may be disregarded in instruments of transfer, but not in those creating a new and original obligation in the nature of a specialty debt: 1 Bates' Law of Partnership, sec. 418, note 2. But where the obligations contained in a bill of sale of personal property, as well as the transfer of the interest in ^{as} the property itself, are within the ordinary scope of the partnership business and within the powers of each individual partner, the nonexecuting partners are not relieved from liability upon such obligations by the mere fact, that the partner signing the firm name affixes a seal.

The firm of Levi Dillon and Sons were dealing in Norman stallions. Each partner had the power to sell these stallions, and there was involved in such power of sale the further power to warrant the quality of the horse as to its fitness for the purpose for which it was sold. Partners are considered as sanctioning the contracts which they singly enter into in the course of trade. By the act of entering into the partnership, each partner is made the general agent of his copartners as to the firm business: *Deckard v. Case*, 5 Watts, 22; 30 Am. Dec. 287. Where a general agent is employed to carry on a business, the authority to sell, which is conferred upon him, may carry along with it the power to warrant, if it is usual, as it was here, to give a warranty when making a sale in such business: *Brady v. Todd*, 9 Com. B., N. S., 591; Biddle on Warranties in the Sale of Chattels, secs. 14 and 15. A general agent employed to carry on the business of horse-dealing for his employer has an implied authority to warrant soundness when making sale of a horse: 2 Benjamin on Sales, secs. 830, 831, pp. 618-620. Where a dealer contracts to supply

an article, in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment of the dealer, there is an implied warranty that it is fit for the purpose to which it is to be applied: *Jones v. Just*, L. R. 3 Q. B. 197; Biddle on Warranties in the Sale of Chattels, sec. 167.

For the reasons here stated we are of the opinion that the circuit court committed no error in refusing the instructions refused, or in admitting the evidence objected to.

The judgment of the appellate court is accordingly affirmed.
Judgment affirmed.

PARTNERSHIP—POWER OF PARTNER TO BIND FIRM BY SEALED INSTRUMENT.

A sealed instrument executed by one partner in the name of the firm, without previous authority or subsequent ratification by his copartners, does not bind the latter: *Van Deusen v. Blum*, 18 Pick. 229; 29 Am. Dec. 582; *Trimble v. Coons*, 2 A. K. Marsh. 375; 12 Am. Dec. 411; *Skinner v. Dayton*, 19 Johns. 513; 10 Am. Dec. 286; *Doe d. Smith v. Tupeper*, 4 Smedes & M. 261; 43 Am. Dec. 483; *Gerard v. Basse*, 1 Dall. 119; 1 Am. Dec. 226; *Robinson v. Crowder*, 4 McCord, 519; 17 Am. Dec. 762; *Shirley v. Fearn*, 33 Miss. 653; 69 Am. Dec. 375; *Worrall v. Munn*, 5 N. Y. 229; 55 Am. Dec. 330; *Hart v. Wähers*, 1 Pen. & W. 225; 21 Am. Dec. 382; *Burwell v. Linthicum*, 100 N. C. 145; *Hull v. Young*, 30 S. C. 121; *Sterling v. Bock*, 40 Minn. 11; *Fore v. Hison*, 70 Tex. 517. In *Schmerts v. Shreves*, 62 Pa. St. 457; 1 Am. Rep. 439, it was held that this want of power exists even when a seal is not essential to the validity of instrument. The same case holds that the addition of a seal to an instrument made by a partner as evidence of an executed contract will not vitiate it, and the same distinction between executed and executory contracts is announced in *Dubois' Appeal*, 38 Pa. St. 231; 80 Am. Dec. 478. A contrary doctrine is recognized in *Tapley v. Butterfield*, 1 Met. 515; 35 Am. Dec. 374; *Price v. Alexander*, 2 G. Greene, 427; 52 Am. Dec. 526; *Walsh v. Lennon*, 98 Ill. 27; 38 Am. Rep. 75. The necessary assent to the execution of the sealed instrument or the subsequent ratification thereof may be given by parol: *Skinner v. Dayton*, 19 Johns. 513; 10 Am. Dec. 286; *Wilson v. Hunter*, 14 Wis. 683; 80 Am. Dec. 795; *Bond v. Atkin*, 6 Watts & S. 165; 40 Am. Dec. 550; *Cady v. Shepherd*, 11 Pick. 400; 22 Am. Dec. 379; *Price v. Alexander*, 2 G. Greene, 427; 52 Am. Dec. 526; *Dramright v. Philpot*, 16 Ga. 424; 60 Am. Dec. 738; *McDonald v. Hggleston*, 26 Vt. 154; 60 Am. Dec. 303; *Kramer v. Dinsmore*, 152 Pa. St. 264.

AGENCY—POWER OF SELLING AGENT TO WARRANT.—An agent to sell has no implied authority to warrant, in the absence of custom: *Pickert v. Marston*, 68 Wis. 465; 60 Am. Rep. 876; *Herring v. Skaggs*, 63 Ala. 180; 34 Am. Rep. 4; *Cooley v. Perrine*, 41 N. J. L. 322; 32 Am. Rep. 210.

SALES—IMPLIED WARRANTY OF FITNESS.—A note on the implied warranty that a manufactured article will answer the purpose intended will be found subjoined to *Bragg v. Morrill*, 24 Am. Rep. 104-114. The general rule referred to in the principal case is recognized also in *Blackmore v. Fairbanks*, 79 Iowa, 292; *Copus v. Anglo-American Provision Co.*, 73 Mich. 542; *Shaw v. Smith*, 45 Kan. 334; *Smith v. Hightower*, 76 Ga. 629.

BRACEVILLE COAL COMPANY v. PEOPLE.

[147 ILLINOIS, 66.]

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—A statute providing a penalty for its violation, which does not apply to all corporations or individuals of the same nature, but operates only upon certain corporations therein named, is unconstitutional and void, as depriving the corporations named of liberty and property without due process of law.

CONSTITUTIONAL LAW.—"DUE PROCESS OF LAW," or, "law of the land," means general public law, binding upon all members of the community, under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals.

CONSTITUTIONAL LAW—LIBERTY, MEANING OF.—The fundamental principle upon which constitutional liberty is based is equality under the law of the land, and there can be no such liberty that is not regulated by such laws as will preserve the right of each citizen to pursue his own advancement and happiness, in his own way, subject only to the restraints necessary to secure the same rights to all others.

CONSTITUTIONAL LAW.—**CONSTITUTIONAL LIBERTY** means not only freedom of the citizen from servitude and restraint, but includes the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare.

CONSTITUTIONAL LAW.—**RIGHT OF PROPERTY** preserved by all constitutions is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful pursuit. The property which each citizen has in his own labor is a common heritage, and as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guarantee.

CONSTITUTIONAL LAW.—**RIGHT TO CONTRACT** is both a liberty and a property right. If any person is denied the right to contract and acquire property in the manner which he has hitherto enjoyed under the law, and which others are still allowed by the law to enjoy, he is deprived of both the constitutional right of liberty and property, to the extent that he is thus denied the right to contract.

CONSTITUTIONAL LAW.—**GENERAL LAWS MAY RENDER THAT UNLAWFUL** in many cases which has, prior thereto, been lawful, but laws depriving particular persons, or classes of persons, of rights enjoyed by the community at large, to be valid must be based upon some existing distinction or reason not applicable to others not included within its provisions.

CONSTITUTIONAL LAW—ABRIDGMENT OF RIGHT TO CONTRACT.—A law singling out persons, corporations, or associations engaged in any particular business, and depriving them of the right to contract as persons, corporations, or associations engaged in other business may lawfully do, is unconstitutional and void.

CONSTITUTIONAL LAW—ABRIDGMENT OF CORPORATION'S RIGHT TO CONTRACT.—When, by a general incorporation law under which a corporation is organized it is granted the right to contract in and about the business for which it is incorporated, a special law restricting its

right to thus contract is necessarily an amendment or change of its charter, and void under a constitutional provision that "no corporation shall be created by special laws, or its charter extended, changed, or amended, but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created."

CONSTITUTIONAL LAW.—RIGHT OF CORPORATION TO CONTRACT INCLUDES RIGHT TO FIX PRICE OF LABOR.—The right to contract granted a corporation by its charter includes the right to fix the price at which labor for it will be performed, and the mode and time of payment. Each is an essential element of the right to contract, and a restriction as to either, as it is enjoyed by the community at large, is an abridgment of the constitutional right of liberty and property.

CONSTITUTIONAL LAW.—STATUTE REQUIRING PAYMENT OF WAGES TO BE MADE WEEKLY to every employee of certain designated classes of corporations, and imposing a penalty for not making such payment is unconstitutional.

THE Braceville Coal Company, a corporation incorporated under a general incorporation law, and engaged in the business of coal-mining, was convicted of violating a statute entitled, "An act to provide for the weekly payment of wages by corporations," and a fine of fifty dollars imposed for which, with costs, judgment was rendered, and from this judgment the company appealed. The statute in question provides: "That every manufacturing, mining, quarrying, lumbering, mercantile, street, electric, and elevated railway, steamboat, telegraph, telephone, and municipal corporation, and every incorporated express company and water company, shall pay, weekly, each and every employee engaged in its business, the wages earned by such employee to within six days of the date of such payment: *Provided*, however, that if at any time of payment any employee shall be absent from his regular place of labor, he shall be entitled to said payment at any time thereafter, upon demand." The statute then provides a penalty of not less than ten nor more than fifty dollars for each violation; that action must be commenced within thirty days after such violation, and that notice that action will be brought must be given, etc., and then proceeds: "No assignment of future wages, payable weekly under the provisions of this act, shall be valid if made to the corporation from whom such wages are to become due, or to any person on behalf of such corporation, or if made, or procured to be made, to any person for the purpose of relieving such corporation from the obligations to pay weekly under the provisions of this act. Nor shall any of said corporations require any agreement from an employee to accept wages at other periods than as provided in section 1 of this act, as a condition of employ-

ment." The corporation exacted a contract from all persons entering its service. Thomas McGuire, the complaining witness, signed one of these contracts, which stipulated, among other things, that "all payments hereunder to be made on regular pay day, and in compliance with the rules and regulations above named, and pay day is hereby fixed for and on the first Saturday after the tenth of each month, when and at which time all wages or moneys that may have been earned during and in the calendar month next prior to such pay day shall be paid, less all moneys owing said party of the first part on any account whatever"; and that "every employee will be paid once a month, at regular pay day, all wages or moneys he may have earned during and in the calendar month next preceding such pay day, after deducting any indebtedness which such employee may owe to the company, or which the company, with the consent of such employee, may have assumed to pay to any other person." McGuire entered the employment of the company under the contract on November 3, 1891, and quit November 13, 1891, and demanded his wages. The company refused to pay him before the next regular pay day, and he then brought this action.

George S. House, for the appellant.

S. C. Stough and William Mooney, for the appellees.

**SHOPE, J.* The principles that must control the decision of this case were announced in *Forer v. People*, 141 Ill. 171. Unless we are prepared to recede from the doctrine of that case, and the subsequent case of *Ramsey v. People*, 142 Ill. 380, the act under consideration must be likewise held unconstitutional and void.

Section 2 of article 2 of the constitution of this state guarantees that no person shall be deprived of life, liberty, or property without due process of law. We said in the *Forer* case, the words "due process of law" "are to be held synonymous with 'the law of the land,'" and, quoting from *Millet v. People*, 117 Ill. 294, 57 Am. Rep. 869, said: "And this means general public law, binding upon all the members of the community under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals." There can be no liberty, protected by government, that is not regulated by such laws as will preserve the right of each citizen to pursue his own advancement and happiness in his own way, subject only to the restraints neces-

sary to secure the same right to all others. The fundamental principle upon ⁷¹ which liberty is based, in free and enlightened government, is equality under the law of the land. It has accordingly been everywhere held that liberty, as that term is used in the constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare: *Fraser v. People*, 141 Ill. 171; *Commonwealth v. Perry*, 155 Mass. 117; 31 Am. St. Rep. 533; *People v. Gillson*, 109 N. Y. 889; 4 Am. St. Rep. 465; *Live Stock Assn. v. Crescent City*, 1 Abb. 388; *Slaughter House Cases*, 16 Wall. 36; *Godcharles v. Wigeman*, 113 Pa. St. 431; *State v. Goodwill*, 83 W. Va. 179; 25 Am. St. Rep. 863.

Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it; and the right of property, preserved by the constitution, is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage, and as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty. In *Fraser v. People*, 141 Ill. 171, we said: "The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in the manner which he has hitherto enjoyed under the law, and which B, C, and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract," and quoted with approval: "The man or the class forbidden the ⁷² acquisition or enjoyment of property in the manner permitted the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness": Cooley's Constitutional Limitations, 893.

It is undoubtedly true that the people, in their representative

capacity, may, by general law, render that unlawful, in many cases, which had hitherto been lawful. But laws depriving particular persons or classes of persons of rights enjoyed by the community at large, to be valid must be based upon some existing distinction or reason not applicable to others not included within its provisions: *Cooley's Constitutional Limitations*, 391. And it is only when such distinctions exist that differentiate, in important particulars, persons or classes of persons from the body of the people, that laws having operation only upon such particular persons or classes of persons have been held to be valid enactments. In *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, we held that it was not competent under the constitution for the legislature to single out operators of coal mines and impose restrictions, in making contracts for the employment of labor, which were not required to be borne by other employers. And in *Froerer v. People*, 141 Ill. 171, a law singling out persons, corporations, or associations engaged in mining and manufacturing, and depriving them of the right to contract as persons, corporations, and associations engaged in other business or vocation might lawfully do, was in violation of the constitution and void. So in *Ramsay v. People*, 142 Ill. 380, "An act to provide for the weighing in gross of coal hoisted from mines," approved June 10, 1891, was held unconstitutional and void for the same reason.

The act under consideration applies not to all corporations existing within the state, or to all that have been or may be organized for pecuniary profit under the general incorporation laws of the state. There is no attempt to make a distinction between corporations and individuals who may employ labor. The slightest consideration of the act will demonstrate that ~~vs~~ many corporations that may be and are organized and doing business under the laws are not included within the designated corporations. No reason can be found that would require weekly payments to the employees of an electric railway that would not require like payment by an electric light or gas company; to a corporation engaged in quarrying or lumbering that would not be equally applicable to a corporation engaged in erecting, repairing, or removing buildings or other structures; to mining that would not exist in respect of corporations engaged in making excavations and embankments for roads, canals, or other public or private improvement of like character; that will apply to a street or elevated railway that will not make it equally important in other

modes of transportation of freight and passengers. The public records of the state will show, and it is a matter of common knowledge, that very many corporations have been organized and are doing business in the state, which necessarily employ large numbers of men, that are not included within the act under consideration.

"The restriction of the right to contract affects not only the corporation, and restricts its right to contract, but that of the employee as well. We need not repeat the argument of the case of *Frorer v. People*, 141 Ill. 171, upon this point. An illustration of the manner in which it affects the employee, out of many that might be given, may be found in the conditions arising from the late unsettled financial affairs of the country. It is a matter of common knowledge that large numbers of manufactories were shut down because of the stringency in the money market. Employers of labor were unable to continue production, for the reason that no sale could be found for the product. It was suggested, in the interest of employees and employers as well as in the public interest, that employees consent to accept only so much of their wages as was actually necessary to their sustenance, reserving payment of the balance until business should revive, and thus enable the factories and workshops to be open and operated with less present expenditure of money. ⁷⁴ Public economists and leaders in the interests of labor suggested and advised this course. In this state and under this law no such contract could be made. The employee who sought to work for one of the corporations enumerated in the act would find himself incapable of contracting as all other laborers in the state might do. The corporations would be prohibited from entering into such a contract, and if they did so the contract would be voidable at the will of the employee, and the employer subject to a penalty for making it. The employee would therefore be restricted from making such a contract as would insure to him support during the unsettled condition of affairs, and the residue of his wages when the product of his labor could be sold. The employees would, by the act, be practically under guardianship; their contracts voidable, as if they were minors; their right to freely contract for and to receive the benefit of their labor, as others might do, denied them.

But treating the restrictions as affecting the corporation only, it is insisted that the reservation of authority by the

general assembly, in section 9 of the General Incorporation Act (Rev. Stats., c. 82), authorized the passage of the act in question. That section provides: "The general assembly shall, at all times, have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under this act." It is said this section entered into and formed a part of the contract under which the grant of the corporate franchise was conferred upon appellant company, it having been organized under the general law.

It was expressly held that the reservation of the right to alter, amend, or repeal the charter entered into and formed a part of the contract between the state and the corporation chartered under the constitution of 1848, and that the power reserved might be constitutionally exercised (*Builer v. Walker*, 80 Ill. 345), and undoubtedly the same construction should be placed upon the reservation of power in the section quoted. But by section 1 of article 11 of the constitution it is provided: "No corporation shall be created by special laws, or its charter extended, changed, or amended; . . . but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created." The manifest intention of this provision of the constitution was to require not only the creation of corporations, but amendments to charters of those existing, to be made by general laws, applicable alike to all occupying like circumstances and existing under the same conditions; and it necessarily follows that special acts, applying to particular corporations only, and not to the general body of corporations created under the act, would fall within the prohibition of this section.

By the general incorporation law appellant company was granted the right to contract as a corporation in and about the business for which it was organized. A restriction of its right to thus contract is necessarily an amendment or change of its corporate powers and functions—of its charter. If, therefore, the restriction is held to fall within the power reserved in section 9 of the act, it must, in view of the constitutional provision, be construed as reserving the power to prescribe such regulations and provisions as the legislature may deem advisable, by general law. The act under consideration, not being a general law, is, therefore, not a warranted exercise of power.

We need not extend this opinion by further discussion.

The right to contract necessarily includes the right to fix the price at which labor will be performed and the mode and time of payment. Each is an essential element of the right to contract, and whosoever is restricted in either as the same is enjoyed by the community at large is deprived of liberty and property.

The enactment being unconstitutional, there is no law authorizing the judgment of the county court, and it will accordingly be reversed.

Judgment reversed.

STATUTES ATTEMPTING TO REGULATE THE RELATIONS OF EMPLOYERS AND EMPLOYEES, by making provisions applicable to a special class of employers requiring them to make payments at stated times, or in particular kind of money or property, or otherwise affecting and limiting the right of a special class of employers to contract with their employees, enacted in several of the states, have been assailed as unconstitutional, with varying success. In the following cases they were upheld: *Shaffer v. Union etc. Co.*, 55 Md. 74; *Peel Splint Co. v. State*, 36 W. Va. 802; *Hancock v. Yaden*, 121 Ind. 366; 16 Am. St. Rep. 396; *Commonwealth v. Perry*, 155 Mass. 117; 30 Am. St. Rep. 533, and in the following overthrown, *State v. Goodwill*, 33 W. Va. 179; 25 Am. St. Rep. 863; *State v. Fire Creek Coal Co.*, 33 W. Va. 188; 25 Am. St. Rep. 891; *Millett v. People*, 117 Ill. 294; 57 Am. Rep. 869; *Froer v. People*, 141 Ill. 171; *Ramsey v. People*, 142 Ill. 380; *State v. Loomis*, 115 Mo. 307; *Godcharles v. Wigeman*, 113 Pa. St. 431.

CHAPIN v. CROW.

[147 ILLINOIS, 219.]

REMAINDERS.—CONTINGENT REMAINDERS ARE NOT FAVORED, and unless it is manifest from the language of the instrument that a contrary result is intended an estate is regarded as vested and not contingent, but effect must be given to the language employed; and if an estate upon contingency is created, it must be so declared.

VESTED REMAINDERS EXIST WHEN the estate is invariably fixed, to remain to a determinate person after the particular estate is spent. In cases of vested remainders, a present interest passes to a fixed person, or class of persons, to be enjoyed in future.

CONTINGENT REMAINDERS EXIST WHEN no present interest passes and the estate in remainder is limited to take effect either to a dubious and uncertain person, or upon a dubious or uncertain event, so that the particular estate may chance to be determined and the remainder never take effect.

REMAINDERS.—DEED CREATING CONTINGENT REMAINDER.—A deed conveying land to A and his assigns during his natural life and upon his death, then to his two sons, "to their heirs and assigns forever in equal parts, if they shall both survive the said A, but if either shall die without issue him surviving, then the survivor shall take all the said prop-

erty hereby conveyed, but if one of said sons shall die leaving issue, then one moiety to the survivor, and the other moiety in equal parts to the children of the deceased," creates an estate in the sons, contingent upon their surviving the life tenant, or if one of them should die and not the other, that the deceased son should have died without issue him surviving.

CONVEYANCES—TERM "CHILDREN," IN ITS NATURAL SENSE, IS A WORD OF PURCHASE, and when used in a deed should be taken to have been so used, unless so controlled and limited by other expressions showing that it was intended as a word of limitation.

REMAINDERS—MEANING OF TERM "CHILDREN" IN DEED CREATING.—When a remainder is conveyed to two sons of a life tenant under a deed providing that if either of such sons shall die without issue the survivor shall take all, but if one of them shall die leaving issue one-half shall then go to the survivor and the remaining half to the children of the deceased, the children of the son dying before the termination of the particular estate take not as heirs of the dead son but as purchasers under the deed.

Wilson, Moore, and McIlvaine, for the appellants.

H. F. White, for the appellee.

221 SHOPE, J. The question presented is, whether, by the deed to the Warringtons, the sons took a vested estate in remainder after the death of their father. If they did, it is conceded appellee had a merchantable title, and the decree was properly entered. The three, Henry, George, and James Warrington, joined in a warranty deed to appellee's grantor, and the question is whether that conveyed a perfect title.

The deed calling for construction was made by Horatio L. Wait and wife to Henry Warrington, George Warrington, and James Warrington, parties of the second part, and purported to convey the premises in question to the "said Henry Warrington and his assigns, for and during the natural life of the said Henry Warrington, and upon his death then unto his sons, the said George Warrington and James Warrington, of the second part, to their heirs and assigns forever, in equal parts, if they shall both survive the said Henry Warrington, but if either of said sons shall die without issue him surviving, then the survivor shall take all the said property hereby conveyed, but if one of said sons shall die leaving issue, then one moiety to the survivor, and the other moiety, in equal parts, to the children of the deceased." *Habendum*: "To have and to hold, all and singular, the above-mentioned and described premises, together with the appurtenances, in conformity with, and in pursuance of, the conditions of the aforementioned grant."

²²² It will not be necessary, in this case, to discuss at length the doctrine of remainders, however interesting that might be. It should, however, be remarked, that the rule is well established that contingent remainders are not favored, and unless, from the language of the instrument, it is manifest that a contrary result was intended, the estate will be regarded as vested, and not contingent. It is, however, equally well settled that effect must be given to the language employed, and if an estate upon contingency is created it must be so declared.

"Vested remainders (or remainders executed, whereby a present interest passes to the party, although to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person after the particular estate is spent": 2 Blackstone's Commentaries, 168. Or, as said by Kent, 4 Commentaries, 202: "A remainder is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. . . . A vested remainder is an estate to take effect in possession after a particular estate is spent." For though it may be uncertain whether a remainder will ever take effect in possession, it will nevertheless be a vested remainder if the interest is fixed. It is the present capacity of taking effect in possession, if the possession were to become vacant, that distinguishes a vested, from a contingent, remainder. In cases of vested remainders a present interest passes to a determinate and fixed person or class of persons, to be enjoyed in the future.

"Contingent or executory remainders (whereby no present interest passes) are where the estate in remainder is limited, to take effect either to a dubious and uncertain person or upon a dubious and uncertain event, so that the particular estate may chance to be determined and the remainder never take effect": 2 Blackstone's Commentaries, 169. "It is," says Mr. Preston (p. 74), "not the uncertainty of enjoyment in future, but the uncertainty of the right to that enjoyment, which marks the difference between an interest which is vested and one ²²³ which is contingent. It is, in one case, the certainty and fixed right of having the enjoyment at the time when the possession shall fall, and in the other case the uncertainty of having this right at that time, which are universally the characteristics and distinguishing features—the former instance of a vested estate, and, in the latter instance, an interest in contingency." Thus it is said by Blackstone,

2 Commentaries, 170: "A remainder may be also contingent where the person to whom it is limited is fixed and certain, but the event upon which it is to take effect is vague and uncertain, as, where land is given to A for life, and in case B survives him then with remainder to B in fee. Here B is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event—the uncertainty of his surviving A. During the joint lives of A and B it is contingent, and if B dies first it never can vest in his heirs, but is forever gone; if A dies first the remainder to B becomes vested": Fearn on Remainders, p. 1.

In *Smith v. West*, 103 Ill. 382, this court quoted with approval from *Hawley v. James*, 5 Paige, 466, as follows: "Where the remainderman's right to an estate in possession cannot be defeated by third persons or contingent events, or by a failure of a condition precedent, if he lives, and the estate limited to him by way of remainder continues till the precedent estates are determined, his remainder is vested in interest." And from *Moore v. Littel*, 41 N. Y. 72, that "decisions and text-writers agree that, by the common law, remainder is vested where there is a person in being who has a present capacity to take in remainder if the particular estate be then presently determined, otherwise the remainder is contingent. . . . The person must be one to whose competency to take no further or other condition attaches, etc., i. e., in respect to whom it is not necessary that any event shall occur or condition be satisfied, save only that the precedent estate shall determine": *Olney v. Hull*, 21 Pick. 811; *Thomson v. Ludington*, 104 Mass. 198; *Hull v. Beals*, 23 Ind. 25; *Dingley v. Dingley*, 5 Mass. 537; *Schofield v. Olcott*, 120 Ill. 362.

In this case, that a life estate was vested in Henry Warrington is unquestioned. The grant is to Henry Warrington and assigns, for and during his natural life, and upon his death then unto his sons, the said George Warrington and James Warrington, of the second part, in equal parts. If the grant to the sons had stopped here there could have been no question that the estate vested in the sons as tenants in common. Such would have been the effect without the words "in equal parts." These words, "in equal parts," are to be read with the succeeding words, "if they shall both survive said Henry Warrington." There can be no question about the intent thus far. But these words are followed by the clause, "but if either of said sons shall die without issue him

surviving, then the survivor shall take all of said property hereby conveyed." That is, the intention expressed is, they shall take in equal parts if they both survive the life tenant, but if one die without surviving issue the other shall take the whole, thus attempting, upon the contingency of one dying during the continuance of the life estate, without issue surviving him, to cast the whole estate upon the survivor. It is unnecessary to determine whether, if the granting clause had ended with this provision, the estate would have vested in the two, subject to be divested as to one who should die during the life estate without surviving issue, or not. In our opinion, the remaining portion of the granting clause clearly indicates an intention that upon the contingency that the son shall die before the termination of the life estate, leaving issue him surviving, the estate of the decedent shall go to his children. As we have seen, after granting to the sons, and their heirs and assigns, in remainder, in equal parts, if they shall both survive the life tenant, but if either should die without issue surviving before the falling in of the precedent estate then the survivor should take the whole, there is the further condition, 225 "but if one of said sons shall die leaving issue, then one moiety to the survivor, and the other moiety, in equal parts, to the children of the deceased." It is clear that by the words, "if one of said sons shall die leaving issue" was meant, if the sons shall die leaving issue before the vesting of the estate in possession—that is, before the termination of the intermediate estate—then and in that event the moiety that would have vested in him had he lived is granted to his children. The term "children," in its natural sense, is a word of purchase, and will be taken to have been so used unless so controlled and limited by other expressions in the instrument as to show that it was intended as a word of limitation. We need not extend this opinion by a discussion of this proposition, it will be found to be well established: *In re Sanders*, 4 Paige, 293; *Baker v. Scott*, 62 Ill. 86; *Beacroft v. Strawn*, 67 Ill. 28; *Rogers v. Rogers*, 3 Wend. 503; 20 Am. Dec. 716.

Not only are there no words tending to show that the word "children" was here used as meaning heirs generally, but it is clearly shown to have meant the issue of the son dying. Upon the contingency, therefore, of one of the sons dying before the falling in of the life estate, leaving children surviving him, such children would take, not as heirs of the son dying, but as grantees in the deed—as purchasers: *Ebey v. Adams*,

135 Ill. 80, and cases cited. This being so, it is apparent that it was not fixed and determined by the deed who should take absolutely at the termination of the precedent estate. If the sons survive the father the estate would be vested in them, both in interest and possession. If one of them died leaving children him surviving, the estate would, upon the termination of the life estate, vest in the survivor of the two sons and the children of the deceased son. If the limitation had been to the sons, and, if they died before the life estate terminated, then to a stranger, no question could have been made that the estate was contingent upon their surviving until the expiration of the intermediate estate. Precisely the same occurs here. The grant is to the sons, if alive when the estate terminates; if not, to their children surviving them, as a class. It cannot be known until the death of the life tenant whether the contingency upon which the sons are to take will exist; nor can it be known whether the children of either one of them will take, as that will depend upon the contingency of issue being born, the death of the sons, and the children surviving them. Nor need we determine here what would be the result if both sons should die during the continuance of the particular estate, with or without issue. It is clear, we think, that the estate in the sons, James and George Warrington, was contingent upon their surviving the life tenant, or, if one of them should die and not the other, that the deceased son should have died without issue him surviving.

It follows, necessarily, that we are of opinion the deed from the Warringtons to Smith, and from Smith to appellee, did not convey a good and merchantable title, and the decree ordering specific performance of the agreement of purchase and sale was therefore erroneously entered. It will accordingly be reversed and the bill dismissed.

Decree reversed.

ESTATES.—REMAINDERS, WHEN VESTED AND WHEN CONTINGENT: See cases cited in the note to *Ducker v. Burnham*, 146 Ill. 2, ante 135. For cases in which devises of the same general nature as that in the principle case were held to create contingent remainders, see *Stump v. Findlay*, 2 Rawle, 168; 19 Am. Dec. 632; *Matter of Ryder*, 11 Paige, 185; 42 Am. Dec. 109.

WILLS—CHILDREN, MEANING OF.—As to when the word "children" in a will is to be construed as a word of purchase, and when as a word of limitation, see cases cited in the note to *Oyster v. Knull*, 21 Am. St. Rep. 892.

HOFFMAN v. REICHERT.

[147 ILLINOIS, 274.]

CORPORATION—POSSESSION OF OFFICER, WHEN POSSESSION OF CORPORATION.—When an officer in a private corporation takes possession of its property, his possession is that of the corporation in the absence of any act or declaration to the contrary, and if the corporation subsequently enters into possession through another of its officers, the former officer cannot maintain forcible entry and detainer against the corporation, although prior to taking possession he purchased the property at sheriff's sale, if the time for redemption has not expired when the corporation takes the later possession through its second officer.

CORPORATIONS—RIGHT OF OFFICER TO PURCHASE AND HOLD PROPERTY IF SOLD UNDER EXECUTION.—The purchase by one of its officers of the property of a corporation sold under execution gives him no title nor right to take possession in his own right, if the time for redemption from such sale has not expired.

CORPORATIONS—DUTIES OF OFFICERS IN.—The officers of a corporation impliedly undertake to give it the benefit of their best care and judgment and to use the powers conferred upon them solely in the interest of the corporation. They have no right, under any circumstances, to use their official positions for their own benefit nor for the benefit of anyone except the corporation itself.

CORPORATIONS—REMEDY OF OFFICER AS CREDITOR.—If a private corporation is indebted to one of its officers for private funds expended by him on its property, and refuses to pay him, he has the right to obtain judgment against it, levy execution upon and sell its property the same as any other creditor.

CORPORATIONS—OFFICER IN CANNOT ACT IN HIS OWN INTEREST.—An officer in a private corporation has no right to avail himself of his position as such officer, to obtain possession of the corporate property, and then use the advantage thus gained for his own private interest.

ACTION of forcible entry and detainer brought by Hoffman to recover a certain coal mine with the machinery and appurtenances known as the Freeburg Coal Company. Hoffman was in possession of the mine under the circumstances detailed in the opinion. After redeeming from the execution sale therein referred to, Reichert, the defendant, as president of said company, took possession of the mine and began to raise coal, whereupon Hoffman brought this action, which was decided against him on the trial below, and he thereupon appealed.

Charles W. Thomas, for the appellant.

Barthel and Farmer, and Turner and Holder, for the appellees.

378 CRAIG, J. We think it is a plain proposition, and one, too, which will not be controverted, that if Hoffman was in the *bona fide*, peaceable possession of the coal mine in his own

right, and while so in possession the defendant approached the employees of Hoffman and induced them to surrender possession to him, and defendant thus entered into the possession of the mine, the defendant's possession would be unlawful and could not be maintained. The case, however, made by the record, stands upon a different basis, and does not fall within the rule indicated. As we understand the record, the possession of the mine ²⁷⁹ never passed out of the Freeburg Coal Company. At the time the mine took fire, in 1884, it had been in the possession and occupancy of the coal company for several years, and that possession was never abandoned or surrendered to any person.

It is true that the mine had been closed, but this was done for the purpose of extinguishing the fire, and for no other purpose. In April, 1887, Hoffman and Reichert, president of the coal company, took possession and commenced making arrangements to remove the water which had accumulated in the mine. At that time Hoffman was still a director and treasurer of the coal company, and whatever he and the president of the company did in resuming the possession of the property, in the absence of any act or declaration to the contrary, it will be presumed they did for and on behalf of the company, and that the possession thus acquired was the possession of the coal company. It is true that the leasehold interest of the company had been sold on execution and purchased by Hoffman; but the time of redemption had not expired, and he had no title to the property, and had no more right to take possession of the property in his own right than a stranger had. Whatever Hoffman did in repairing the mine and placing it in condition so that it could be successfully operated must be regarded as having been done for and on behalf of the coal company, and in an appropriate action he would be entitled to recover for all moneys and outlays expended in placing the mine in proper condition for operation. If Hoffman, before taking possession of the property, had resigned as director and treasurer, and notified the company that he would no longer act for it, a different question would be presented. But such was not the case.

In speaking in regard to the duties of directors of a corporation, Morawetz on Private Corporations, volume 1, section 511, says: "The directors or trustees of a corporation, in accepting their appointment to office, impliedly undertake to give the company the benefit of their best care and judg-

ment, and ²⁹⁰ to use the powers conferred upon them solely in the interest of the corporation. They have no right, under any circumstances, to use their official positions for their own benefit or the benefit of anyone except the corporation itself. It is for this reason that the directors have no authority to represent the corporation in any transaction in which they are personally interested, in obtaining an advantage at the expense of the company. The corporation would not have the benefit of their disinterested judgment under these circumstances, as self-interest would prompt them to prefer their own advantage to that of the company." The same rule is announced in *Gilman etc. R. R. Co. v. Kelly*, 77 Ill. 434.

If the coal company was indebted to Hoffman, and refused to pay him, he, no doubt, had the right to resort to the courts and obtain a judgment, and after obtaining judgment he was at liberty to levy on the property of the corporation and sell the same, in like manner as other creditors. But he had no right to avail of his position as an officer in the corporation to obtain possession of the corporate property, and then use the advantage thus gained for his own private interest. There was a trust relation existing between him and the corporation. He was a trustee, and the possession he acquired was that of the *cestui que trust*. The possession of the mine, therefore, held by Hoffman was the possession of the corporation, which it might resume at any time it saw proper.

What has been said disposes of the questions raised on the instructions.

The judgment of the appellate court will be affirmed.

Judgment affirmed.

Mr. Justice PHILLIPS, having heard this cause in the appellate court, took no part in the decision here.

CORPORATIONS.—FIDUCIARY POSITION OF DIRECTORS: See note to *Beach v. Miller*, 17 Am. St. Rep. 298-308, as to contracts between a corporation and its directors. As a general rule a director cannot purchase the corporate property: See case just cited, and also *Hoffman etc. Co. v. Cumberland etc. Co.*, 16 Md. 456; 77 Am. Dec. 311; *Sweeney v. Grape Sugar Co.*, 30 W. Va. 443; 8 Am. St. Rep. 88; *Chicago etc. Oak Co. v. Yerkes*, 141 Ill. 320; 33 Am. St. Rep. 315; *Crescent City Brewing Co. v. Flanner*, 44 La. Ann. 23; *Balsleigh v. Fitzpatrick*, 43 N. J. Eq. 501 (mortgage sale); *San Francisco Water Co. v. Patten*, 85 Cal. 623 (execution and tax sales).

WASHINGTON ICE COMPANY v. CITY OF CHICAGO.

[147 ILLINOIS, 237.]

EMINENT DOMAIN—SETTING OFF BENEFITS AGAINST DAMAGES.—For land taken for a public use no benefits to land not taken can be set off, but payment of the compensation for the damages accruing to the land not taken may be made in benefits to the property not common to the other property affected, that is, the special benefits accruing to the particular property may be set off against the damages done to the land not taken by the improvement so that if the special benefits equal or exceed the damages the owner can recover nothing as damages to property not taken; if less he will recover the difference only.

EMINENT DOMAIN—INSUFFICIENCY OF ORDINANCE TO AUTHORIZE CONDEMNATION.—An ordinance for the opening of a street which fails to state the nature or character of the improvement proposed to be made on the street when opened, and which also fails to give any basis or *data* from which an estimate of the cost of the improvement can be made in accordance with the statute, to be apportioned among or upon the property benefited, is fatally defective, and no special assessment provided for therein can be made thereunder to pay the cost of such improvement.

EMINENT DOMAIN—INSUFFICIENCY OF ORDINANCE AS BASIS FOR BENEFITS TO LAND NOT TAKEN.—An ordinance for the opening of a street across a large tract of land which fails to state the character or nature of the improvement to be accomplished, further than the opening of the street, or to establish a grade, or to bind the petitioner to do more than open the street, does not constitute a basis for the introduction of evidence of benefits to accrue to the landowner as to the part of his land not taken, or for an instruction based upon an estimate of benefits to be derived from the street as giving to him access to all parts of his land and thus making it desirable for manufactories. An estimate of benefits formed upon such basis is improper, and cannot be received as a setoff to the damages resulting to the land not taken.

EMINENT DOMAIN—ASSESSMENT OF DAMAGES—SETOFF OF BENEFITS.—Private property cannot be damaged for public use without just compensation. While damages to the property not taken may be set off by special benefits accruing from the improvement, such benefits must be real and not chimerical.

EMINENT DOMAIN—ASSESSMENT OF DAMAGES—DATA FOR BASIS OF ESTIMATE.—When, in proceedings to condemn land for the opening of a street, the benefits to flow from the making of the improvement necessarily depend on the manner in which it is to be made, *data* of its nature and character must be furnished from which an intelligent estimate of benefits can be made, and in no other way can evidence of benefits to accrue, or the view of the jury aid them in arriving at just compensation, and in whatever mode such *data* is furnished it must be specific and binding, and the judgment in condemnation is not conclusive upon the landowner unless the improvement is made in substantial compliance with the *data* furnished.

EMINENT DOMAIN—ASSESSMENT OF DAMAGES—PRESUMPTION.—In proceedings to condemn land for the opening of a street, it will not be presumed that the city will make sufficient improvement of the land taken to off-

set damages to land not taken when no improvement has been, and never may be, ordered to be made.

EMINENT DOMAIN—ASSESSMENT OF DAMAGES—SETOFF OF BENEFITS.—In proceedings to condemn a strip of land for the opening of a city street out of a larger tract, it is error to instruct the jury that in assessing damages to land not taken it should setoff all benefits caused by the proposed improvement, when the entire tract consists of an ice-pond and it is not shown that the city intends to improve the proposed street by building it up to a grade above the level of the water. There can be no benefit to such land unless the proposed street is so improved after being opened as to be passable, and open to ordinary travel.

Ullmann and Hacker, for the appellant.

Charles C. Gilbert, Henry S. Waldron, and John S. Miller, for the appellee.

329 **SHOPE, J.** The city of Chicago passed an ordinance for the opening of One Hundredth street, from Commercial avenue to the east line of section 7, township 37, range 15. Section 1 provided that One Hundredth street be and is ordered opened between the points named, by condemning therefor a strip of land 66 feet wide, parcel of land particularly described. Section 2 provided: "Said improvement shall be made, and the cost thereof paid for, by special assessment, to be levied upon the property to be benefited thereby, to the amount the same may be legally assessed therefor, and the remainder of such cost to be paid by general taxation," in accordance with article 9 of the Cities and Villages Act. Section 3 directs the corporation counsel to file a petition, etc., in the name of the city of Chicago, praying that just compensation to be made for private property to be taken or damaged for said improvement be ascertained, etc., and to file a supplemental petition, in accordance with the provisions of section 53 of said article 9. A petition was accordingly filed, seeking to have the just compensation to be paid appellant and others ascertained by a jury, as required by law.

The proposed extension of the street involved the taking of a strip of land 66 feet wide, and 1,980 feet long, comprising $2\frac{2}{3}$ acres belonging to appellant, and leaving a strip $88\frac{1}{2}$ feet south, and the balance of its 64 acre tract north of the proposed street. It appears that the tract belonging to appellant was originally a swamp, lying on the west or north-
330 westerly shore of the Calumet river. The tract was purchased fourteen or fifteen years ago, and an embankment built upon the north, east, and south sides of the tract, to prevent overflow from the Calumet river, and to make a pond,

into which water could be pumped for the purpose of freezing, and cutting ice. The west edge of the pond was protected by a natural ridge. The proposed improvement passed through this pond a distance of 1,830 feet, and thence over appellant's land 150 feet to the river, then crossed the river, and extended some distance beyond, to the east line of said section 7. At the time of the trial the water in the pond was five or six feet deep, and, as already seen, a strip $88\frac{1}{2}$ feet wide and 1,830 feet long lay south of the proposed street. Appellant filed a cross-petition, claiming damages, by reason of the improvement, to its land not taken. A trial by jury resulted in finding that compensation in the sum of thirteen thousand five hundred dollars should be made for land taken, and nothing for damages to land not taken. Motion for new trial was overruled, and judgment entered on the verdict.

Numerous errors are assigned, but, in the view we take, a consideration of one of them only will be necessary.

The constitution provides that private property shall not be taken or damaged for public use without just compensation. For land taken no benefits to land not taken can be set off, but payment of the compensation for the damages accruing to the land not taken may be made in benefits to the property, not common to the other property affected; that is, the special benefits accruing to the particular property may be setoff against the damages done to land not taken by the improvement, so that if the special benefits equal or exceed the damages, the owner can recover nothing as damages to property not taken; if less, he will recover the difference, only. The constitutional provision is equally mandatory that property shall not be damaged for public use without just compensation, as it is that it shall not be taken for such use without ³³¹ just compensation, so that, in some one of the modes prescribed, compensation must be made for damages to the property, arising from the improvement. These principles are so fundamental and familiar that the citation of cases is unnecessary.

The ordinance in this case provides that the improvement shall be paid for by special assessment, to be levied upon the property benefited thereby, to the amount the same may be lawfully assessed, the remainder to be paid by general taxation. It is not necessary, if important, that we should pause to discuss the sufficiency of this ordinance to authorize the levy of a special assessment. It is obvious that no special assessment could be levied under it. The nature or char-

acter of the improvement (Rev. Stats., sec. 19, arts. 9, 24) is nowhere given. Whether the street is to be filled to some or any grade is not provided, or whether, through the pond and thence to the river, the roadbed is to be raised above the level of the water by embankment or stone walls or trestlework, or whether the embankment across the sixty-six feet condemned will be removed and the roadway made upon the natural level of the soil, or otherwise, is left wholly undetermined. No basis or data are given from which an estimate of the cost could be made in accordance with the statute, to be apportioned among and upon the property benefited: *Levy v. Chicago*, 113 Ill. 650; *Murphy v. Peoria*, 119 Ill. 509; *Kankakee v. Potter*, 119 Ill. 324; *City of Sterling v. Galt*, 117 Ill. 11. It is clear, therefore, that the city has made no provision for the improvement of the street proposed to be opened.

Upon the trial of the cause it was contended that the benefits from the construction of the street, to appellant's land not taken, equaled or exceeded the damages, and the witnesses for the city expressly put their estimate of the benefits to accrue, upon the basis that by the opening of this street access would be given to all parts of appellant's land from the west, through to the Calumet river. What possible basis is laid ³³³ for the estimate of these benefits? In the evidence there was nothing, if it be conceded that would have been sufficient, tending to show the manner in which the improvement of the street was proposed to be made. No grade was established, no width of roadway fixed, or description given of material to be used, in the evidence, the ordinance, or elsewhere in the case. The evidence offered by appellant, with a view of getting before the jury the nature and character of the improvement of the street across appellant's land that might be made, was excluded at the instance of the city.

It is apparent that to make the street of any avail to give access over appellant's land to the river, to say nothing of its extension across and beyond, it is necessary that it be graded through the marsh, and raised above the ordinary floods of the Calumet river. To make the land of the appellant available for manufacturing purposes, for which purpose it is shown to be of the greatest present value, it is shown, and in effect conceded, it must be filled in to a considerable depth, at a cost of from three thousand dollars to four thousand dollars an acre. Manifestly, the opening of the street at the level of the soil, by tearing away the embankments erected by ap-

into which water could be pumped for the purpose of freezing, and cutting ice. The west edge of the pond was protected by a natural ridge. The proposed improvement passed through this pond a distance of 1,830 feet, and thence over appellant's land 150 feet to the river, then crossed the river, and extended some distance beyond, to the east line of said section 7. At the time of the trial the water in the pond was five or six feet deep, and, as already seen, a strip $88\frac{1}{2}$ feet wide and 1,830 feet long lay south of the proposed street. Appellant filed a cross-petition, claiming damages, by reason of the improvement, to its land not taken. A trial by jury resulted in finding that compensation in the sum of thirteen thousand five hundred dollars should be made for land taken, and nothing for damages to land not taken. Motion for new trial was overruled, and judgment entered on the verdict.

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It is apparent that to make the street of any avail to give access over appellant's land to the river, to say nothing of its extension across and beyond, it is necessary that it be graded through the marsh, and raised above the ordinary floods of the Calumet river. To make the land of the appellant available for manufacturing purposes, for which purpose it is shown to be of the greatest present value, it is shown, and in effect conceded, it must be filled in to a considerable depth, at a cost of from three thousand dollars to four thousand dollars an acre. Manifestly, the opening of the street at the level of the soil, by tearing away the embankments erected by ap-

pellant, where they cross the strip of land condemned, would not only destroy the pond of appellant, but would be of little practical utility to the residue of appellant's land. The mere paper opening of the street, without improvement so as to make it available, aside from not being the basis upon which the case was tried, could be of but little practical benefit under the existing conditions. The opening of the streets of the city, and the nature and character of their improvement, reside, necessarily, in the discretion of the municipal authorities: *Aurora v. Pulfer*, 56 Ill. 270. And while the city may fill in this street with earth to the height of the present embankment around the pond, or put trestlework through the pond, or adopt such material as it shall deem best, it is clear that it is under no obligation to do so. The city has proposed no plan of improvement, and ²²² done nothing to estop itself from dealing with this street as, in the discretion of its authorities, may be deemed best. What improvement it proposes to make, beyond the mere opening of the street, is left to the sheerest conjecture.

We have, then, in this case, an estimate of benefits upon the basis that a street is to be improved through or over this low, wet, and marshy land, so as to give ready access to all parts of it, and thereby bring it into prominence, and make it desirable for the location and operation of manufactories, without even a proposal on the part of the city to so construct it, and without any legal obligation whatever resting upon the city to do more than open it.

Counsel for appellee are accurate in their statement that section 19 of article 9 of the Cities and Villages Act does not control in proceedings purely for condemnation. The reason for the requirement that an ordinance providing for the making of a local improvement by special assessment shall contain therein the nature, character, locality, and description of the improvement is well understood, and need not be restated: See cases *supra*. But private property cannot be damaged for public use without just compensation, and while, as before seen, damages to the property not taken may be set off by special benefits accruing from the improvement, the benefits must be real, and not chimerical, otherwise the constitutional safeguard is rendered of no avail to protect the citizen in the enjoyment of his property, free from being damaged for a public use without just compensation. That appellant's property was damaged by being cut in two, in the manner de-

scribed, is not questioned, and if not compensated by special benefits accruing to his land not taken, compensation should have been awarded.

Ordinarily, the opening of the street, and such improvement thereof as is usually made by the city from its general funds, may furnish sufficient basis for estimating the benefits to accrue therefrom to adjacent property. In such cases no ³³⁴ farther description of the nature and character of the improvement would, it seems, be required. But where, as here, the benefits to flow from the making of the improvement necessarily depend upon the manner in which it is to be made—its nature and character—*data* should be furnished from which an intelligent estimate of benefits can be made. In no other way can the testimony of witnesses be of value, or the view of the jury aid them in arriving at just compensation. It is not necessary to hold that the *data* must be furnished in the ordinance, or specifications thereunder, although, by analogy to the proceedings in cases for the assessment of special benefits, it would seem to be the appropriate mode. But whatever method is adopted should be so far specific and binding that the judgment in condemnation would not be conclusive upon the owner unless the improvement is made in substantial conformity with the *data* furnished: *Wabash etc. Ry. Co. v. McDougall*, 126 Ill. 111; 9 Am. St. Rep. 539. If it be insisted that it must be presumed that the city will make a sufficient improvement, etc., the contention is answered by *Hutt v. Chicago*, 132 Ill. 352. No such presumption can arise where the improvement has not been and may never be ordered to be made.

We are of opinion that the court erred in instructing that in assessing damages to land not taken the jury should take into consideration and set off special benefits, and in overruling the motion for a new trial. The judgment of the circuit court is accordingly reversed, and the cause remanded.

Judgment reversed.

EMINENT DOMAIN.—BENEFITS HOW FAR MAY BE CONSIDERED AS OFFSETS TO DAMAGES: See, generally, note to *Symonds v. Cincinnati*, 45 Am. Dec. 532. Special benefits only are to be considered: *Winona etc. R. R. Co. v. Waldron*, 11 Minn. 515; 88 Am. Dec. 100; *Tide Water Co. v. Coster*, 18 N. J. Eq. 518; 90 Am. Dec. 634; *Adden v. White Mountains R. R. Co.*, 55 N. H. 413; 20 Am. Rep. 220; *Hilbourne v. County of Suffolk*, 120 Mass. 393; 21 Am. Rep. 522; *Whiteley v. Mississippi Water etc. Co.*, 38 Minn. 523; *Stockton v. Chicago*, 136 Ill. 434; *Chicago etc. Ry. Co. v. McGrew*, 104 Mo. 282; *Gorgas v. Philadelphia etc. Ry.*, 144 Pa. St. 1; *Wilmington etc. R. R. Co. v. Smith*, 99 N. C.

131. *Contra*; *Bohm v. Metropolitan etc. R. R. Co.*, 129 N. Y. 576. In some states, by the express provision of the constitution, full compensation is to be awarded irrespective of benefits accruing from the improvement: *San Bernardino etc. Ry. Co. v. Haven*, 94 Cal. 489; *Interstate Ry. Co. v. Simpson*, 45 Kan. 714.

WRIGHT v. GRIFFEY.

[147 ILLINOIS, 496.]

RES JUDICATA.—That a former adjudication may constitute an absolute bar to a subsequent action there must be, as between the two actions, identity of persons, of subject matter, and of cause of action; but when some controlling fact or question, material to the determination of both actions, has been adjudicated in the former suit by a court of competent jurisdiction, and the same fact or question is again at issue between the same parties, its adjudication in the first action is, if properly presented, conclusive of the same question in the later suit, irrespective of whether the cause of action is the same in both suits or not. This doctrine is limited to matters involved in the litigation, but is equally applicable whether the point decided is, of itself, the ultimate vital point, or only incidental, if still necessary to the decision of that point.

RES JUDICATA—PARTIES.—The mere joining, in a second suit, of a nominal party who has no interest in the subject matter in litigation does not prevent a prior adjudication from being a bar.

RES JUDICATA—PARTIES.—A judgment in an action at law between two parties which necessarily adjudicates that certain corporation stock belongs to them jointly, but not to either severally, is a bar to a suit in equity by one to compel the other to assign the stock to him, on the ground that the former has no interest therein, but holds the legal title for the latter.

RES JUDICATA—MATTERS ADJUDICATED, HOW FOUND.—Ordinarily, the pleadings in a former suit when introduced in a second action will show what was within the issues and determined in the first suit, and a fact or question is no less at issue or within the conclusive effect of the first judgment because the averments of the declaration and traverse therein are general. The difference between cases where the issue is general and those wherein it is limited by the pleading to a single point, is, that the matter which appears by inspection of the record in the latter must in the former be established by evidence. Parol evidence of what occurred upon the former trial, and what was actually decided, is always admissible in such cases.

G. W. and J. F. Kretzinger, for the appellant.

Runnells and Burry, for the appellee.

498 **SHOPE, J.** The single question presented by this record is, whether complainant is estopped from the further prosecution of this cause by the judgment in the common-law suit brought by him against appellee in the superior court of Cook county.

There is a well-founded distinction between the effect of a judgment as a bar or estoppel to the prosecution of a second suit for the same cause of action and its effect as an estoppel where the same question is again brought in issue in another suit between the same parties upon a different cause of action. Where the former adjudication is relied upon as an absolute bar to a subsequent action it must be shown that the cause of action and thing to be recovered are the same in both proceedings. While the particular form of action may not be important, there must be, as is generally laid down, as between the two actions, identity of parties, of subject matter and of cause of action, to constitute the first a bar to the second. Where, however, some controlling fact or question material to the determination of both of the causes has been adjudicated in the former suit by a court of competent jurisdiction, and the same fact or question is again at issue between the same parties, its adjudication in the first will, if properly presented, be conclusive of the same question in the later suit, irrespective of whether the cause of action is the same in both suits or not. The latter is in some of the cases designated as estoppel by verdict: *Cromwell v. County of Sac*, 94 U. S. 351; *Hanna v. Read*, 102 Ill. 596; 40 Am. Rep. 608; *Tilley v. Bridges*, 105 Ill. 336; *Attorney General v. Chicago etc. R. R. Co.*, 112 Ill. 520; *Umlauf v. Umlauf*, 117 Ill. 583; 57 Am. Rep. 880; Freeman on Judgments, 254-260; Bigelow on Estoppel, 36 et seq., and cases cited.

In *Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 608, we said: "Whether the adjudication relied on as an estoppel goes to a single question or all the questions involved in a cause the fundamental principle upon which it is allowed in either case is, that justice and ^{and} public policy alike demand that a matter consisting of one or many questions, which has been solemnly adjudicated by a court of competent jurisdiction, shall be deemed finally and conclusively settled in any subsequent litigation between the same parties, where the same question or questions arise, except when the litigation is a direct proceeding for the purpose of reversing or setting aside such adjudication." And in *Attorney General v. Chicago etc. R. R. Co.*, 112 Ill. 520, after quoting from the opinion in the case last mentioned, this court, by the late Mr. Justice Scholfield, said: "This doctrine is limited to matters necessarily involved in the litigation, but it is equally applicable whether the point was, itself, the ultimate vital

point, or only incidental, but still necessary to the decision of that point." The defense interposed in this case clearly falls within the class of estoppels last referred to, and the objection to its interposition, for the reason that the cause of action was not the same in both suits, cannot prevail.

It is also insisted that the judgment in the common-law action is not conclusive, in this suit, of the matter there determined because the parties are not identical. The point made is, that the Silver Islet Mining and Milling Company, being a party to this and not to the former proceeding, the judgment therein is not admissible to conclude the complainant. The contention is without merit. The company, by its answer, disclaimed any interest in the subject matter of the litigation, and stands indifferently between the parties, ready to conform to any decree the court may enter between the parties to the controversy. The only relief asked against it is to preserve the right of complainant *in statu quo* as against the defendant, Griffey, or by way of execution of the decree to be obtained against him. The company is at best but a nominal party. The entire litigation is between Wright and Griffey, and if they have litigated the same question or matters in another suit, in a court of competent jurisdiction, where they have ~~see~~ been adjudicated, there is neither reason nor authority for holding that they are not concluded by such adjudication because the complainant sees proper or deems it necessary to join a mere nominal party, having no interest in the subject matter of the litigation: *Thompson v Roberts*, 24 How. 283; *Follansbee v. Walker*, 74 Pa. St. 306; *Hitchin v. Campbell*, 2 W. Black. 779; *Lawrence v. Vernon*, 8 Sum. 20; *Hanna v. Read*, 102 Ill. 596; 40 Am. Rep. 608; Bigelow on Estoppel, 2d ed., 46 et seq.

It remains, therefore, to be seen whether any matter material to the issue in the common-law suit was necessarily determined in that action which, as evidence, is conclusive of the right to the relief sought by the complainant in his original bill.

Ordinarily the pleadings in the former suit, when introduced, will show what was within the issue tried and determined therein. A fact or question is no less at issue or within the conclusive effect of the verdict and judgment because the averments of the declaration and traverse are general. The difference between cases where the issue is thus general and those where it is limited, by the pleading, to a single point is,

that the matter which appears by the mere inspection of the record in the latter must in the former be established by evidence. Parol evidence of what occurred upon the former trial and what was actually decided is always admissible in such cases. It appeared from the transcript of the proceedings in the common-law suit that the declaration consisted of the common counts, with which was filed an account of various items aggregating \$4,317.67. Defendant filed the general issue, with notice of setoff, and asking for judgment over. The matters of setoff consisted of \$5,000 received by the plaintiff from one Lamson for the use of the defendant, arising from the sale of 6,000 shares of Silver Islet Mining and Milling Company stock by plaintiff and defendant jointly to Lamson; that plaintiff had received in cash \$10,000 from Lamson, one-half of which—that is, said sum ⁵⁰¹ of \$5,000—was due and owing by plaintiff to defendant, and the further sum of one-half of \$8,333.33, being the balance of the purchase money for said capital stock received by plaintiff from Lamson, etc. It also appeared that the cause was submitted to a jury who, after hearing the evidence, etc., returned a verdict finding the issues for the defendant, and assessing his damages at \$418.70; that motion for new trial by plaintiff was overruled, and judgment rendered upon the verdict in favor of the defendant for \$418.70 and costs.

Upon looking into the stenographic report of the evidence introduced, and admitted here without objection, it appears that it was conceded by both parties that upon the organization of the Silver Islet Mining and Milling Company certain properties were transferred to it, standing in the name of the plaintiff, Wright, in payment for its stock. A one-half interest had been bargained to what was known as the "Iowa Syndicate" and John Cudahy, and that certain other shares had been disposed of to other parties, and the residue of the stock of the company belonged, as claimed by Wright, to him, Wright, and as claimed by defendant, Griffey, to Wright and himself, jointly and equally. Six thousand shares of the stock thus owned by one or both were sold to Lamson for \$18,333.33, of which \$10,000 was paid in cash to Wright, the plaintiff, and the residue was to be paid out of profits, etc. There is no controversy as to the residue, and no evidence was offered tending to show liability of Wright to account for it, and that item, in the notice of setoff, dropped out of the case. The items of plaintiff's account filed with his declara-

tion were practically undisputed, the only contention of the defendant being, that instead of being credits in favor of plaintiff, a part of them were payments made to him by Wright out of and on account of the one-half of the cash received from Lamson. The only contest was as to the ownership of the stock of said mining company remaining after the admitted sales to others.

⁵⁰² Griffey, in support of his notice, testified that he was an equal owner with the plaintiff in the properties transferred to said mining company, and by its transfer became the owner and was entitled to one-half its stock. He was permitted by the court to detail in that case the circumstances showing in what manner he became the owner, jointly with the plaintiff, of such properties and the stock of the company. A large number of letters of the plaintiff, and evidence of other witnesses, was introduced, tending to corroborate Griffey, and show that he was the owner of one-half of the properties before the transfer, and afterward of one-half of the stock of the company. The defendant neither claimed nor set up any claim to the \$5,000 moiety of the cash paid by Lamson on the purchase of said 6,000 shares other than that he was the equal owner with Wright in said properties and stock. The plaintiff, Wright, testified, in his own behalf, that the mining properties transferred to said company were his individually, and that Griffey had no right or interest in the same whatever, and accounted for portions of the stock having been issued in the name of the defendant by explanations inconsistent with Griffey's ownership of the stock, and on that trial claimed that 3,400 shares, being the same now sought to be recovered by the bill in this case, were held by Griffey for his benefit only. It is clear, therefore, that unless it was found by the jury, in that cause, that Griffey was entitled to one-half of the \$10,000 received by the plaintiff from Lamson, the plaintiff must have recovered, practically, the full amount of the items of his account, and that Griffey had no setoff, unless it was one-half of the sum of \$680, which he claimed to have advanced on joint account of himself and Wright.

It is absolutely clear that that case turned upon the question whether Griffey was joint owner with Wright in the capital stock of the Silver Islet Mining and Milling Company, as claimed by him, or was Wright the exclusive owner of that stock, as he claimed. That that was the issue submitted, ⁵⁰³ appears also from the instructions of the court.

The jury were told "that all the evidence introduced as to the ownership of the property and stock of the Silver Islet Mining Company, and concerning the proceeds of the stock claimed by defendant to have been owned jointly, together with all of the other evidence, is to be taken into consideration in arriving at the state of accounts between the parties." And by another instruction they were told that "the defendant, Griffey, is entitled to have credited against the plaintiff's claim anything that may be due him from plaintiff on account of the Silver Islet Mining and Milling Company, or its properties, and if, on all the evidence before the jury, a balance is found in favor of the defendant," they should so find, and fix the amount in their verdict, etc. The jury therefore necessarily found that appellee, Griffey, was jointly and equally interested with Wright in the properties transferred to said mining company and in its stocks, otherwise, as we have seen, the verdict must have been for the plaintiff for over \$4,000, instead of for \$418.70 for the defendant. By the allowance of the \$5,000 and the other claim of Griffey the jury reached a correct result.

If the same result was reached upon the trial of this cause—that is, if it was found that Griffey was the joint and equal owner with Wright in the properties and stock of said company—it needs no argument to show that it would be absolutely conclusive against all right to the relief sought by the original bill. To determine the issue in that case it became necessary to find the fact as to whether Griffey was the joint and equal owner with Wright of the stock of said company, and that is the controlling issue in this case. By the bill, Wright seeks to compel Griffey to assign and transfer to him 3,100 shares of the capital stock of the said company, issued in Griffey's name, claiming that Griffey has no interest in them—that he, Wright, was the owner of the properties transferred to the mining company, and the owner of its stocks. ⁵⁰⁴ Griffey sets up and insists by his answer that he was the joint and equal owner with Wright in the properties transferred to said company, and in the stock thereof, and that these stocks were issued in his name on division of the residue of the stocks remaining after the Lamson and other sales of stock had been made. It appears, therefore, that the fact of ownership of the stock of the Silver Islet Mining and Milling Company has been adjudicated in a suit between these same parties, and that the judgment remains in full force. This

being so, under the rules before announced, the complainant is estopped from relitigating the same question in this suit.

We are of opinion that the circuit court decided correctly, and the judgment of the appellate court will be affirmed.

Judgment affirmed.

JUDGMENTS—CONCLUSIVENESS AS RESPECTS THE SUBJECT MATTER DECIDED.—To constitute a judgment in one suit a bar to a second suit, it must appear that the issue in the second suit upon which the judgment is brought to bear was a material issue in the first suit and necessarily determined therein, and that the former judgment was upon its merits: *Liddell v. Childer*, 84 Ala. 508; 5 Am. St. Rep. 387; *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436, and note; *Hunley v. Holt*, 59 Conn. 102; 21 Am. St. Rep. 71, and note. A judgment is conclusive if on a direct point though the object of the two suits is different: *Gallagher v. Moundville*, 34 W. Va. 730; 26 Am. St. Rep. 942, and note. See the extended notes to *Hawk v. Evans*, 14 Am. St. Rep. 250, and *Gayer v. Parker*, 8 Am. St. Rep. 229.

JUDGMENTS—CONCLUSIVENESS AS RESPECTS PARTIES: See *Dyett v. Hyman*, 129 N. Y. 351; 26 Am. St. Rep. 533; *Central Baptist Church v. Manchester*, 17 R. I. 492; 33 Am. St. Rep. 893, and note; *Jones v. Vert*, 121 Ind. 140; 16 Am. St. Rep. 379, and note; *Ashton v. Rochester*, 133 N. Y. 187; 26 Am. St. Rep. 619, and note; *Nave v. Adams*, 107 Mo. 414; 28 Am. St. Rep. 421, and note. See, also, the extended note to *Hill v. Bain*, 2 Am. St. Rep. 876-878.

JUDGMENTS—HOW PROVED.—When a judgment is relied on as an estoppel, it can be proved only by offering in evidence a complete and duly authenticated copy of the entire proceedings in which the judgment was rendered: *Gibson v. Robinson*, 90 Ga. 756; 35 Am. St. Rep. 250, and note. If a judgment is relied on as an estoppel, it must appear by the record of the prior suit, or by evidence *abundant* consistent therewith, that it was between the same parties, and that the particular controversy sought to be concluded was necessarily tried and determined: *Haines v. Funn*, 26 Neb. 380; 18 Am. St. Rep. 785, and note.

FRANKLAND v. JOHNSON.

[147 ILLINOIS, 520.]

NEGOTIABLE INSTRUMENTS—DENIAL OF LIABILITY—PRACTICE.—Although in an action on a note, the party sought to be charged personally as maker does not deny the execution of the note by plea verified by affidavit, he may nevertheless deny that it ever became his personal obligation, and show that he executed it in behalf of a corporation of which he was superintendent.

NEGOTIABLE INSTRUMENTS—EXECUTION OF BY OFFICER OF CORPORATION—WHO BOUND BY.—A note by which a corporation promises to pay a certain sum, not signed in the name of the corporation, but by an individual as "general superintendent," is not conclusively the note of the corporation. It may be shown to be the personal note of the party so signing it. In an action to charge him personally the burden of proof

is on him to show affirmatively that in so making the note he had authority to bind the corporation.

AGENCY—CORPORATIONS—PERSONAL LIABILITY OF AGENT.—If an agent, either of a corporation or an individual, enters into a contract which he has no authority to make, he binds himself personally, according to the terms of the contract.

AGENCY—CORPORATIONS—PERSONAL LIABILITY OF AGENT—BURDEN OF PROOF.—If a person undertakes to contract as agent for an individual or a corporation, and contracts in a manner not legally binding upon his principal, he is personally liable, and when sued upon such contract, can exonerate himself from personal responsibility only by showing his authority to bind those for whom he undertook to act.

AGENCY—QUESTION OF, WHEN NOT OPEN TO REVIEW ON APPEAL.—When the question of fact as to whether or not a note signed by an officer of a corporation is his personal contract, or that of his principal, is determined by the trial court, that question is not open to consideration on appeal.

J. W. Waughop and M. J. Dunne, for the appellant.

M. L. Thackeberry, for the appellee.

523 **WILKIN, J.** This was an action in *assumpsit*, by appellee, against appellant, commenced in the superior court of Cook county by attachment. The declaration consisted of the common counts, and a special count upon the following instrument:

"\$5,592.00

CHICAGO, June 1, 1885.

"On or before the first day of June, 1888, the Western Seaman's Friend Society agrees to pay to L. M. Johnson, or order, the sum of five thousand five hundred and ninety-two dollars, with interest at the rate of six per cent per annum.

"B. FRANKLAND, Gen. Supt."

The special count alleges that the defendant on, etc., "made his certain promissory note in writing, . . . in and by which said note the said defendant, by the name, style, and description of 'the Western Seaman's Friend Society,' promised to pay the said plaintiff, etc., . . . and that he, the said defendant, at the same time and place of the execution of the note aforesaid, and as part of the same transaction, by a certain writing upon the face of said note, guaranteed the prompt payment of the same, and undertook and promised to pay to the order of said plaintiff the sum of money therein mentioned, . . . which writing was in the words and figures, to wit," and signed "B. Frankland, Gen. Supt." The affidavit for attachment alleged that the defendant was a non-resident of the state, and that upon diligent inquiry his place of residence could not be ascertained. An amended affidavit

set up other causes for attachment; but in our view of the case it is unimportant.

To the declaration defendant filed a plea of *nonassumpsit*, and to the writ of attachment a plea in abatement, traversing the allegations of the affidavit. On these pleas issue was joined, and a trial partially had before a jury; but before it was concluded it was agreed between the parties that the jury might be discharged, and the case be submitted to the court, ⁵²⁴ which was done. Judgment was rendered for plaintiff for the amount of the note sued on and sustaining the attachment. The defendant appealed to the appellate court, and it affirmed the judgment of the superior court.

As to the cause of action, the question between the parties is, whether the instrument sued on is the personal note of the defendant or that of the Western Seaman's Friend Society. It is contended by counsel for appellee that, there being no plea, verified by affidavit, denying the execution of the instrument, the defendant cannot question his individual liability upon it. This position is based upon section 34, chapter 110, of our statute, which provides that no person shall be permitted to deny, on trial, the execution of any instrument in writing upon which any action may have been brought, unless the person so denying the same shall, if defendant, verify his plea by affidavit. The defendant did not claim the right, on the trial, to deny the execution of the note. He admits that fact, but denies that, as executed, it became his personal obligation. This, we think, he might do without a sworn plea, and that seems to have been the view of the trial court. The defendant was permitted to introduce his own and the testimony of other witnesses, giving his version of all the facts and circumstances under which the note was made, and therefore had the benefit of all the facts available to him as a defense under any state of pleading.

The writing on its face is not distinctly the note of Frankland. A personal note by him, in proper form, would have used the personal pronoun "I" instead of the name of the corporation, and would have been signed without the designation "Gen. Supt." Neither is it, by its terms, the note of a corporation. As such, it should have been signed with the name of the corporation, by its president, secretary, or other officers authorized to execute it; or, as in *Scanlan v. Keith*, 102 Ill. 634, 40 Am. Rep. 624, by the proper officers designating themselves officers of the corporation for which they

assumed to act; or, ⁵²⁵ as in *New Market Savings Bank v. Gillet*, 100 Ill. 254, 39 Am. Rep. 39, using the corporate name both in the body of the note and in the signatures to it.

But if it be conceded that, *prima facie*, a general superintendent of a corporation has authority to make promissory notes in its name, and this instrument be held to appear, on its face, to be the obligation of the society rather than of Frankland, certainly it could not even then be contended that it was conclusively so. It is well understood that if the agent, either of a corporation or an individual, makes a contract which he has no authority to make, he binds himself personally, according to the terms of the contract: Angell and Ames on Corporations, sec. 303. It was said by Sutherland, J., in *Mott v. Hicks*, 1 Cow. 573, 13 Am. Dec. 556: "It is perfectly well settled that if a person undertake to contract, as agent, for an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he is personally responsible (citing authorities). And the agent, when sued upon such a contract, can exonerate himself from personal liability only by showing his authority to bind those for whom he has undertaken to act. It is not for the plaintiff to show that he had not authority. The defendant must show, affirmatively, that he had." This rule is quoted with approval in *Wheeler v. Reed*, 36 Ill. 91.

This action is against Frankland, individually. The note is declared upon as his personal promise to pay. The question, then, as to whether it is his contract or that of the Western Seaman's Friend Society is one of fact, and so it was treated on the trial. Both parties went fully into the facts and circumstances leading to and attending the making of the note. So far from showing affirmatively that appellant had authority to make the note so as to bind the corporation, the evidence strongly tends to show the contrary, and that it was the intention of the parties that he should be individually responsible. No record proceedings whatever, on the part of ⁵²⁶ the corporation, pertaining to appellant's transactions with appellee or her husband, were shown. It is clear that if suit had been against the society there could have been no recovery on the evidence in this record. At all events, the facts have been settled adversely to appellant, and are not open to review in this court.

The propositions submitted to the trial court by appellant, to be held as law applicable to the case, are mainly requests

to hold certain facts to have been proved, and, under the evidence, they were all properly refused. In fact, no argument is made in support of them. There is but one theory on which the judgment below could be reversed by this court, and that is, that the note sued on must be held to be the contract of the corporation, absolutely and conclusively, and all parol proof tending to establish appellant's liability was incompetent, and that theory is clearly untenable.

As to the judgment on the attachment, it is only necessary to say that the evidence at least tended to support the allegations of the original affidavit, and the judgment of affirmance in the appellate court is conclusive.

The judgment of the appellate court will be affirmed.
Judgment affirmed.

AGENCY—AGENT WHEN PERSONALLY LIABLE.—This question is thoroughly discussed in *Cream City Glass Co. v. Friedlander*, 84 Wis. 53; 36 Am. St. Rep. 895, and note, where the cases are collected.

NEGOTIABLE INSTRUMENTS EXECUTED BY OFFICER OF CORPORATION.—WHO BOUND BY: See *Casco Nat. Bank v. Clark*, 139 N. Y. 307; 36 Am. St. Rep. 705, and note with the cases collected.

GREGG v. ILLINOIS CENTRAL RAILROAD COMPANY.

[147 ILLINOIS, 550.]

COMMON CARRIERS—LIABILITY OF, WHEN TERMINATES.—The liability of a railroad company, as a common carrier of freight, ceases upon the unloading of the goods from the car at the place of destination, and placing them in a safe and secure warehouse; or, if the carrier is not required or expected, in the usual course of business, to remove the freight from the car, then by delivering the car in a safe and convenient position for unloading, at the elevator, warehouse, or other place designated by the contract, or required in the usual course of business; or if no place of delivery is thus designated or required, then on its sidetrack in the usual and customary place for unloading by consignees.

COMMON CARRIERS—PRESUMPTION AS TO PLACE OF DELIVERY.—Upon the arrival of freight at its destination, there being no designated warehouse or place of delivery, and it not being shown that in the usual course of business the carrier is bound to deliver at any particular place, it is to be presumed that the consignee is to receive the goods on the track when they are transported by a railroad company.

COMMON CARRIERS—PLACE OF DELIVERY TO TERMINATE LIABILITY AS CARRIER.—If the consignee fails to designate a place of delivery for freight carried by rail, the contract of carriage should determine when the cars, in proper and safe condition, are placed at the usual and ordinary place of keeping or storing cars containing like freight, upon the

railroad company's tracks, and where they can be safely and conveniently unloaded. In such case the question to be determined is whether or not anything remains to be done by the carrier in completion of its contract to carry safely and deliver the goods at the place of destination, and, if there is, its liability as a carrier continues; if not, and the goods remain in possession of the carrier, its liability in respect thereto, when not varied by contract or usage, is as a warehouseman only.

COMMON CARRIERS—LIABILITY FOR FAILURE TO GIVE NOTICE OF NON-REMOVAL OF FREIGHT.—When the owner of goods ships them by rail to himself, with directions to the carrier to notify the owner's agent of their arrival only, the failure of the carrier to notify such owner of the failure of his agent to remove or care for the goods after notice of their arrival does not render the carrier liable for their loss unless such failure on its part has operated to the injury of the owner.

COMMON CARRIERS—DELIVERY AS TERMINATING LIABILITY—DUTY TO STORE.—When a consignee is in default in not receiving freight after its arrival at its destination, and after reasonable time and opportunity has been afforded in which to take it, the carrier cannot abandon it, but is required to exercise ordinary and reasonable care for its preservation as a warehouseman, but in the exercise of such care it may leave it in its cars, store it in its own warehouse, assuming the liability of bailee or warehouseman; or it may, with the exercise of a like degree of care in selecting a responsible and safe depository, store the goods in an elevator or warehouse, at the expense and risk of the owner, and thereby discharge itself from further liability.

COMMON CARRIERS—DELIVERY TO TERMINATE LIABILITY—LIABILITY FOR LOSS IN WAREHOUSE.—If a consignee is in default in not receiving freight, after reasonable time and opportunity in which to do so, the carrier may then store the goods in a safe warehouse, and is not thereafter liable for an injury by unprecedented flood, which could not have been anticipated or guarded against.

A CARRIER HAS A LIEN FOR FREIGHT charges upon the goods transported while it retains dominion and control of them, but when it delivers possession the lien is gone.

COMMON CARRIERS—PRESERVATION OF LIEN FOR FREIGHT CHARGES WHILE GOODS ARE IN WAREHOUSE.—A carrier, upon the default of the consignee to receive goods shipped to him after reasonable time and opportunity to so do, may store the goods in a safe warehouse in its own name, and thus preserve its lien for freight charges without subjecting itself to further liability as a warehouseman, and the warehouseman with whom the goods are stored will then hold them for the benefit of both the carrier and the consignor.

ACTION to recover the value of corn lost and damaged by flood after being transported by a railroad company, and stored in a warehouse by it in its own name. Judgment for the defendant, and plaintiff appealed.

Otis and Graves, for the appellant.

C. V. Gwin, for the appellee.

⁵⁵⁵ **SHOPE, J.** The principal question presented is, whether the relation of appellee to the corn shipped by appellant was that of common carrier, at the time it was damaged. It is suggested, rather than argued, that appellee, as the initial carrier, limited, by contract, its liability for damages to such as might occur while carrying upon its own lines of road, and that it is not, therefore, liable for the conduct of connecting lines over which the freight was carried to its destination. In the view we take of the case it is unnecessary to discuss or determine this question: See *Illinois Central R. R. Co. v. Frankenberg*, 54 Ill. 88; 5 Am. Rep. 92; *Chicago etc. Ry. Co. v. Northern Line Packet Co.*, 70 Ill. 217; *Erie Ry. Co. v. Wilcox*, 84 Ill. 239; 25 Am. Rep. 451; *Wabash etc. Ry. Co. v. Jaggerman*, 115 Ill. 407. Conceding the liability of appellee for the acts and misfeasance of connecting lines, we are of opinion the relation of common carrier had ceased before injury to the property occurred.

The law is well settled in this state that the liability of a railroad company, as a common carrier of freight, ceases upon the unloading of the goods from the car at the place of destination, and placing them in a safe and secure warehouse, or, where the carrier is not required in the usual course of business, or expected, to remove the freight from the car, as in the case of grain in bulk, coal, lumber, and the like, by delivering the car in a safe and convenient position for unloading, at the elevator, warehouse, or other place designated ⁵⁵⁶ by the contract, or required in the usual course of business; or, if no place of delivery is thus designated or required, on its sidetrack, in the usual and customary place for unloading by consignees: *Porter v. Chicago etc. R. R. Co.*, 20 Ill. 407; 71 Am. Dec. 286; *Illinois Cent. R. R. Co. v. Alexander*, 20 Ill. 28; *Richards v. Michigan etc. R. R. Co.*, 20 Ill. 404; *Chicago etc. R. R. Co. v. Scott*, 42 Ill. 132; *Merchants' Dispatch Co. v. Hallock*, 64 Ill. 284; *Illinois Cent. Ry. Co. v. Mitchell*, 68 Ill. 471; 18 Am. Rep. 564; *Chicago etc. Ry. Co. v. Bensley*, 69 Ill. 630; *Cahn v. Michigan Cent. Ry. Co.*, 71 Ill. 96; *Merchants' Dispatch Co. v. Moore*, 88 Ill. 136; 30 Am. Rep. 541; *Pittsburgh etc. Ry. Co. v. Nash*, 43 Ind. 423; *Southwestern R. R. Co. v. Felder*, 46 Ga. 433.

In the case at bar, upon the arrival of the corn at its destination, there being no designated warehouse or place of delivery, and it not being shown that in the usual course of business the carrier was bound to deliver at any particular

place, it is to be presumed that the consignee was to receive the same on track, and in the event of a failure of the consignee to designate a place of delivery, the contract of carriage would determine when the cars, in proper and safe condition, were placed at the usual and ordinary place of keeping or storing cars containing like freight, upon the railroad company's tracks, and where they could be safely and conveniently unloaded. In all such cases the question to be determined is, whether anything remains to be done by the carrier in completion of its contract to safely carry and deliver the goods at the place of destination. If there is, its liability as carrier continues; if there is not, and the goods remain in possession of the carrier, its liability in respect thereof, when not varied by contract or usage, is as warehouseman, only: *Chicago etc. R. R. Co. v. Warren*, 16 Ill. 502; 63 Am. Dec. 317; *Peoria etc. Ry. Co. v. United States Rolling Stock Co.*, 136 Ill. 643; 29 Am. St. Rep. 348; *East St. Louis etc. Ry. Co. v. Wabash etc. Ry. Co.*, 123 Ill. 594; *Missouri Pac. Ry. Co. v. Chicago etc. Ry. Co.*, 25 Fed. Rep. 317; *Independence Mills Co. v. Burlington etc. Ry. Co.*, 72 Iowa, 535; 2 Am. St. Rep. 258; *Goold v. Chapin*, 10 Barb. 612; Angell on Carriers, 291; Hutchinson on Carriers, sec. 356.

This freight was consigned by appellant to his own order to Augusta, Georgia, with instructions to the carrier to "notify Dunbar & Co." There is no pretense that the grain was not properly carried, in good order, to its destination, and was there in proper position for delivery to the consignee in apt time, or that notice was not given to Dunbar & Co. promptly upon the arrival of the freight. The carrier had completed its contract of carriage, and obeyed the instructions of the consignor in giving notice, in apt time, of the arrival of the grain at destination. It is not shown when the various consignments of corn arrived in Augusta, but it is clear that one of the cars—2,500 l. c.—had reached its destination before the 11th of August, 1888, and it is also apparent that all five of the cars, containing the corn sued for, arrived before the 23d of August, 1888, but how long prior to these dates the shipments were completed does not appear.

It is insisted, however, that the contract of carriage was not completed because notice of the failure of Dunbar & Co. to take the corn was not given to the consignor, and it is shown that the course of dealing was for appellee to notify appellant of the failure of the consignee, or person to be notified,

to take the shipment, and it is insisted that appellant was justified in relying upon such notice being given, and that if notice had been given he could have cared for the corn by storing it or shipping it elsewhere, in which event the loss would not have occurred. We do not find it necessary to determine whether, under the course of dealing shown, appellee would be liable for failure to give such notice. The loss or injury to the corn occurred by the flood of September 10th following the arrival of the corn in Augusta, and, conceding that the flood was a cause for which the railroad company was not ⁵⁵⁸ responsible, it is said that the negligence of the railroad company in not giving such notice contributed immediately to the loss, and it is therefore liable. This contention is without force, for the reason that it is affirmatively shown that appellant was notified by Dunbar & Co. Dunbar & Co. were not entitled to receive the corn except upon payment of the drafts drawn against it, and production of the bills of lading: *Indianapolis etc. R. R. Co. v. Herndon*, 81 Ill. 143; *Joslyn v. Grand Trunk Ry. Co.*, 51 Vt. 92; *Pennsylvania Ry. Co. v. Stern*, 119 Pa. St. 24; 4 Am. St. Rep. 626; *Watson v. Hoosac Tunnel Line*, 13 Mo. App. 263; Wood on Railway Law, 1594. By the letter of Dunbar & Co., of August 11th, as we have seen, appellant was notified of the arrival of at least one of the cars of corn in controversy; and that, because of the condition of the market, Dunbar & Co. would be unable to meet the drafts drawn against the shipment. Thereupon the brokers suggested, as will be seen, a plan by which the time could be extended fifteen or sixteen days, to enable Dunbar & Co. to sell the corn in Augusta. It is clear, we think, from the language of this letter and the subsequent conduct of the parties, that this referred not only to the corn then on track, but to the shipments that were immediately to follow. The suggestion was, that Dunbar & Co. would draw upon appellant, to cover the drafts of appellant upon them as they matured, accompanying their drafts by the original bills of lading as collateral; that Dunbar & Co. could arrange to take care of the corn without having to keep it on the railway track, and that they would commence drawing on the following Monday, and appellant could redraw on Dunbar & Co. at ten days, etc. Appellant accepted the proposition of Dunbar & Co., paid the drafts drawn by them, and redrew at ten days; again discounting these drafts in Chicago. The transaction shows that appellant knew that Dunbar & Co. were

unable to realize upon the grain, and thereby pay the first drafts and take up the bills of lading, upon the presentation ^{see} of which, only, would they be entitled to receive the corn, and that the purpose of the arrangement entered into and carried out was to gain time to enable them to sell the corn at Augusta. Appellant was advised that within the fifteen or sixteen days thus to be gained, "we" (Dunbar & Co.) "hope to place a great part of it." He also was advised that Dunbar & Co. proposed to get the corn off the railroad track, and was told, "We can arrange to take care of the stuff itself without having to keep it on the track." The testimony of appellant shows that when his drafts for "this grain" matured, Dunbar & Co. paid them by making demand drafts back on appellant, with the original bills of lading attached, which he paid, and made new drafts at ten days, with the bills of lading attached, and that these latter were accepted by Dunbar & Co., but not paid.

We think no one can read this record without being convinced that it was understood by the parties that this arrangement, which appellant admits he accepted, related to all the corn now in controversy. It is manifest, not only that appellant knew that Dunbar & Co. had not received the corn, but that they were not entitled to receive it, and also that appellant voluntarily arranged to leave the corn under the control of Dunbar & Co., for sale at Augusta. It was clearly, we think, within the contemplation of the parties, that the corn was to be taken from the railroad track under an arrangement to be perfected by Dunbar & Co., and the corn to remain in Augusta to be sold by them. This was the sole purpose of the arrangement carried out, and it is clear, therefore, that if any duty existed on the part of the railroad companies to give notice of the failure of Dunbar & Co. to produce the bills of lading and claim the grain, their failure in nowise operated to the injury of appellant.

It is urged that the railway company was at fault in depositing the grain with Dunbar & Co., whose warehouse was submerged by the flood, when there were other elevators and warehouses at Augusta upon higher ground, and which were ^{see} not affected by the flood, in which the grain might have been stored. The question of whether it could have been thus stored may be said to be a controverted question of fact. But waiving that, and also, for the present, the question of whether Dunbar & Co. were not the agents of ap-

pellants to take care of and store the grain, the court was justified in holding, as it did, in effect, in its rulings upon the propositions offered, that the railroad company was not liable because of storing with Dunbar & Co.; that the warehouse of Dunbar & Co. was a safe and secure place for storing the grain, except for the flood mentioned, is unquestioned. That the flood was unprecedented and extraordinary, both in the the rapidity of its rise and extent, is clearly shown. Many of the witnesses had resided at Augusta from twenty-five to thirty years, and all testify that no flood endangering the warehouse or its contents had occurred within their knowledge. It appears from the evidence that business streets of the city were under water, stocks of goods destroyed, the railway company's tracks and depot submerged. It is apparent from the record that no foresight, however prudent and careful, could have anticipated damage to the corn from that source. The railroad company was not required to keep the corn in its cars on track indefinitely, and although the consignee was in default in not receiving the freight after reasonable time and opportunity had been afforded in which to take it, the carrier could not abandon it, but was required to exercise ordinary and reasonable care for its preservation as warehouseman. In the exercise of such care it might leave it in the cars, store it in its own warehouse, assuming the liability of bailee or warehouseman therefor, or it might, with the exercise of like degree of care in selecting a responsible and safe depository, store the grain in an elevator or warehouse at the expense and risk of the owner, and thereby discharge itself from further liability: *Illinois Cent. R. R. Co. v. Alexander*, 20 Ill. 23; *Richards v. Michigan etc. R. R. Co.*, 20 Ill. 404; *Porter v. Chicago etc. R. R. Co.*, 20 Ill. 407; 71 Am. Dec. 286; approved in *Davis v. Michigan etc. R. R. Co.*, 20 Ill. 412; and other cases *supra*; *Clendaniel v. Tuckerman*, 17 Barb. 189; *Fisk v. Newton*, 1 Denio, 45; 48 Am. Dec. 649; *Goold v. Chapin*, 10 Barb. 612; *Western Transportation Co. v. Barber*, 56 N. Y. 544; *Alabama etc. R. R. Co. v. Kidd*, 35 Ala. 209; *Smith v. Nashua etc. R. R. Co.*, 27 N. H. 86; 59 Am. Dec. 364; *Hutchinson on Carriers*, 488.

It is insisted, and a proposition was submitted presenting the contention, that Dunbar & Co. were the agents or warehousemen of the Georgia Railroad Company, and they having failed, as it is alleged, to use proper efforts to dry the corn after its having been submerged, that appellee is liable for

the damages thus occasioned. It is shown that corn, after having been wet, and remaining under water three or four days, as this was, may be dried, and that it will sell in the market for something less than sound corn. This contention is based, principally, upon the fact that the Georgia Railroad Company took the receipts of Dunbar & Co., as warehousemen, to itself. Waiving the question, not made by counsel, as to the liability of the initial carrier for the conduct of the terminal connecting line after the carriage has ceased and the liability of warehouseman has attached, we are of opinion, upon the facts shown, there was no liability on the part of appellee for the negligence of Dunbar & Co., if any is shown, in the respect indicated. The grain was detained at Augusta by the consent of appellant, with the understanding that fifteen or sixteen days' time could be gained by the arrangement of drawing and redrawing before mentioned, in which Dunbar & Co. might dispose of it. If, by such an arrangement, appellant, without the consent of appellee or the terminal line, could continue the liability of the Georgia Railroad Company as warehouseman for fifteen days, and compel it to keep the grain on track, and bind appellee as the initial carrier, it could do so for thirty, ninety or any number of days. The effect would be that railroad companies would be compelled to ⁵⁶³ retain their cars on track indefinitely, and their tracks become blocked with cars awaiting the convenience of consignees. There is no duty attaching to the common carrier of this character.

It seems to be well settled that the carrier has a lien upon the goods transported, for its charges, while it retains dominion and control of the same. The rule undoubtedly is, as between the lienor and general owner, that a lien can exist only while the lienor retains possession of the property. If he deliver possession, the lien is gone: *Skinner v. Upshaw*, 2 Ld. Raym. 752; *Sodergreen v. Flight*, 6 East, 612; *Forth v. Simpson*, 13 Q. B. 680; *Bigelow v. Heaton*, 4 Denio, 496; *McFarland v. Wheeler*, 26 Wend. 467; *Wingard v. Banning*, 39 Cal. 643; *Reineman v. Chicago etc. R. R. Co.*, 51 Iowa, 338; *Hutchinson on Carriers*, sec. 479; 2 *Parsons on Contracts*, *207, note e. The terminal carrier, upon the default of the consignee to receive the grain, might have stored it in the warehouse of a responsible third person, in the name and for the benefit of the consignee alone. It is unnecessary to discuss, here, what would have been the effect of such storing, with

notice to the warehouseman of the lien of the railroad company for its freight charges, or whether its lien could have been thus preserved. What the terminal railroad company did was to deposit it in its own name, thereby preserving its lien. The warehouseman held the property for the benefit of both the carrier and consignor—for the carrier for the purpose of preserving its lien: *Western Transportation Co. v. Barber*, 56 N. Y. 544; "*The Eddy*," 5 Wall. 481; *Brittan v. Barnaby*, 21 How. 527; *Alden v. Carver*, 13 Iowa, 253; 81 Am. Dec. 430.

The storing of the grain with Dunbar & Co. was for the benefit of the owner, subject only to the condition of his discharging the lien by paying the freight. This was, we think, the legal effect of this transaction. Dunbar & Co. had proposed to arrange for taking care of the corn, for the benefit and convenience of appellant, without leaving it on track.

§ 53 The evidence shows that the railroad company claimed the right to charge one dollar per car for each twenty-four hours the car remained upon its track, unloaded, after the expiration of forty-eight hours after the arrival of the car at destination. Appellant, as he testifies, accepted the proposition of Dunbar & Co., and, as we have seen, the parties acted upon it and carried it out. The evidence shows that Dunbar & Co. applied to the railroad company and proposed storage of the corn in their warehouse, and went to the trouble of sacking it to enable them to get it off track. What was done was in furtherance of the proposition made in appellant's interest by his broker, who, as between the railroad company and appellant, must, in respect of this transaction, be regarded as the agent of the latter. The railroad company was not bound to waive its lien for its charges, under the circumstances here shown, by an absolute delivery of the property, by depositing in the name and for the benefit of the consignee, but might rightfully preserve the same by arranging with Dunbar & Co. for its preservation, without subjecting itself to further liability as warehouseman. We think the effect of the arrangement was to constitute Dunbar & Co. warehouseman of appellant, who held the property for him, subject only to the lien for the carrier's charges.

We are of opinion that the trial court ruled correctly in refusing the various propositions submitted by appellant, and the judgment of the appellate court will accordingly be affirmed.

Judgment affirmed.

COMMON CARRIER—LIABILITY, WHEN CEASES.—The delivery of goods by a common carrier in good condition at the place designated will relieve it from liability as such: *Scheu v. Benedict*, 116 N. Y. 510; 15 Am. St. Rep. 426, and note with the cases collected; *Western Transp. Co. v. Newhall*, 24 Ill. 466; 76 Am. Dec. 760, and note; *Blumenthal v. Bruinerd*, 38 Vt. 402; 91 Am. Dec. 349, and note; *Missouri Pac. Ry. Co. v. Haynes*, 72 Tex. 175. The liability of a railroad company as a common carrier does not cease until it has placed the car containing the goods in such a position at the destination that it can with safety and a reasonable degree of convenience be unloaded by the consignee: *Independence Mills Co. v. Burlington etc. Ry. Co.*, 72 Iowa, 535; 2 Am. St. Rep. 256, and note; *South etc. Alabama R. R. Co. v. Wood*, 66 Ala. 167; 41 Am. Rep. 749. See also the notes to the following cases: *Railroad v. Kelly*, 30 Am. St. Rep. 906; *Adams Express Co. v. Darnell*, 99 Am. Dec. 586; *McMillan v. Michigan etc. R. R. Co.*, 93 Am. Dec. 228; *Goold v. Chapin*, 75 Am. Dec. 404; *Porter v. Chicago etc. R. R. Co.*, 71 Am. Dec. 290; *Blossom v. Griffin*, 67 Am. Dec. 82; *Mobile etc. R. R. Co. v. Prewitt*, 7 Am. Rep. 591; *Hayes v. Wells, Fargo & Co.*, 83 Am. Dec. 95; *Fisk v. Newton*, 43 Am. Dec. 650; *Farmers' etc. Bank v. Champlain Transp. Co.*, 16 Vt. 52; 42 Am. Dec. 491.

CARRIERS—DELIVERY—DUTY TO NOTIFY CONSIGNEE OF ARRIVAL OF GOODS.—To constitute a constructive delivery the carrier must, if practicable, give notice to the consignee of the arrival of the goods: *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170; 6 Am. St. Rep. 350, and note; *Hermans v. Goodrich*, 21 Wis. 543; 94 Am. Dec. 562, and note. A common carrier's liability as a carrier continues until the goods have been placed in a warehouse, the consignee notified of their arrival, and he has had a reasonable time to remove them: *McMillan v. Michigan etc. R. R.*, 16 Mich. 79; 93 Am. Dec. 208; but see *Norris v. Savannah etc. Ry. Co.*, 23 Fla. 182; 11 Am. St. Rep. 355. See also the notes to the following cases: *Farmers' etc. Bank v. Champlain Transp. Co.*, 56 Am. Dec. 84; *Porter v. Chicago etc. R. R. Co.*, 71 Am. Dec. 290, and the extended note to *Mobile etc. R. R. Co. v. Prewitt*, 7 Am. Rep. 591.

CARRIERS—DUTY TO STORE GOODS.—A carrier who wishes to wholly terminate his liability for goods must store them: *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170; 6 Am. St. Rep. 350; *Scheu v. Benedict*, 116 N. Y. 510; 15 Am. St. Rep. 426, and note; *Smith v. Nashua etc. R. R. Co.*, 27 N. H. 86; 59 Am. Dec. 364; but see *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 349, where the contrary doctrine is maintained.

CARRIERS—LIABILITY AS WAREHOUSEMEN.—If the owner of goods shipped over a railroad permits them to remain at the depot of their destination an unreasonable time the liability of the railroad company as a carrier is terminated and it becomes liable only as a warehouseman: *Union Pac. Ry. Co. v. Moyer*, 40 Kan. 184; 10 Am. St. Rep. 183, and note; *Bansemmer v. Toledo etc. Ry. Co.*, 25 Ind. 434; 87 Am. Dec. 367; *Rice v. Hart*, 118 Mass. 201; 19 Am. Rep. 433, to the same effect; *Merchants' Dispatch etc. Co. v. Moore*, 83 Ill. 136; 30 Am. Rep. 541. This question will be found fully discussed in *Lancaster Mills v. Merchants' Cotton-press Co.*, 89 Tenn. 1; 24 Am. St. Rep. 566, and note. See also *Railroad v. Kelly*, 91 Tenn. 699; 30 Am. St. Rep. 902, and the notes to the following cases: *Heeg v. Licht*, 36 Am. Rep. 658; *McMillan v. Michigan etc. R. R. Co.*, 93 Am. Dec. 230; *Blossom v. Griffin*, 67 Am. Dec. 82; *Schmidt v. Blood*, 24 Am. Dec. 147.

CARRIERS—LIEN FOR FREIGHT.—A carrier has a lien upon goods carried by him, and a right to retain possession of them, as against the owner until

his reasonable charges are paid: *Ames v. Palmer*, 42 Me. 197; 66 Am. Dec. 271; *Wilson v. Grand Trunk Ry.*, 56 Me. 60; 96 Am. Dec. 435, and note; *Denver etc. Ry. Co. v. Hill*, 13 Col. 35; *Galena etc. R. R. Co. v. Roe*, 18 Ill. 488; 68 Am. Dec. 574; *Potts v. New York etc. R. R. Co.*, 131 Mass. 455; 41 Am. Rep. 247; *New Haven Co. v. Campbell*, 128 Mass. 104; 35 Am. Rep. 360, and note. See the note to *Wells v. Thomas*, 72 Am. Dec. 243.

GROMMES v. ST. PAUL TRUST COMPANY.

[147 ILLINOIS, 684.]

LANDLORD AND TENANT—EVICTION—WHAT CONSTITUTES.—Acts by a landlord in interference with his tenant's possession, to constitute an eviction, must clearly indicate an intention that the tenant shall no longer continue to hold the premises.

LANDLORD AND TENANT—EFFECT OF EVICTION ON RENT.—Eviction by the landlord relieves the tenant from the payment of rent accruing after his possession ceases, but rent already accrued and overdue is not forfeited thereby.

LANDLORD AND TENANT—RE-ENTRY OF LANDLORD, WHEN TERMINATES LEASE AND RENT.—If a lease stipulates that for any breach of covenant the lease shall determine and be utterly void at the election of the lessor, an entry by the landlord is an exercise of his option to determine the lease, and he cannot recover for subsequent rent.

LANDLORD AND TENANT—RE-ENTRY BY LANDLORD, WHEN DOES NOT TERMINATE RENT.—If a lease provides that a re-entry and taking possession by the landlord shall not have the effect of determining the lease, nor operate to prevent its continuing in force, such re-entry for the nonpayment of rent does not relieve the tenant from the payment of rent subsequently accruing to the end of the term.

LANDLORD AND TENANT—AGREEMENT TO PAY RENT AFTER RE-ENTRY BY LANDLORD—VALIDITY.—An agreement in a lease by the tenant and his sureties that the obligation of the tenant to pay all the rent to the end of the term shall remain, notwithstanding a re-entry for default in the payment of rent, is valid, and may be enforced against them as to rent subsequently accruing after such default and re-entry, no matter whether it is called rent or damages for a breach of covenant.

LANDLORD AND TENANT—RE-ENTRY BY LANDLORD—DISPOSITION OF RENTS SUBSEQUENTLY COLLECTED.—A provision in a lease against a forfeiture, by the re-entry of the landlord, of the rent to be paid during the whole term, does not authorize the landlord to collect the subsequent rent after such re-entry both from the tenant named in the lease and also from any tenant to whom the lessor may re-let, but the rent due from the original tenant is to be credited with such rent as is realized from the re-letting. The landlord is entitled to such sum as shall be equal to the rent required by the terms of the lease to be paid during the whole term, and not to any greater sum.

WITNESSES—INTEREST, WHEN DISQUALIFIES.—In an action against the sureties of a tenant by the executors of a deceased landlord for the recovery of rent, the tenant is not a competent witness for the sureties, as he is directly interested in the result of the suit.

JUDGMENTS AGAINST PRINCIPAL AS EVIDENCE AGAINST SURETY.—In the absence of notice and opportunity to defend, or of assumed responsibility for the result of an action, a judgment against the principal therein is not conclusive against his surety, but can be introduced against him only as evidence of its own existence, and not as evidence of any of the facts upon which its recovery rests.

LANDLORD AND TENANT—ASSIGNMENT OF LEASE AS DISCHARGE OF TENANT.—An assignment of the lease or a subletting of the premises by the tenant, with the written consent of the landlord, will not discharge the tenant or his sureties from liability to pay rent when such assignment or subletting is authorized by the lease.

LANDLORD AND TENANT—LIABILITY OF ASSIGNEE FOR RENT AS DISCHARGE OF TENANT.—The assignee of a leasehold estate is liable for the rent according to the terms of the lease, but the fact of his liability after the assignment does not discharge the original tenant or his sureties from his covenant to pay rent, and in case the rent is not paid by the assignee as it becomes due, an action may be maintained against such tenant therefor; and it makes no difference in this respect that the landlord may have received rent from the assignee and accepted him as a tenant.

LANDLORD AND TENANT—ACCEPTANCE OF RENT FROM ASSIGNEE OF LEASE AS DISCHARGE OF TENANT.—If there is an express covenant to pay rent for a term of years, the mere acceptance of rent from the assignee of the tenant does not discharge the latter unless the landlord enters into such stipulations with the assignee as to accept him as sole tenant and absolve the original tenant, and in the absence of such substitution and a clear intent to enter into such new contract, both the original tenant and his assignee will be liable to the landlord for the rent stipulated for in the lease.

LANDLORD AND TENANT—ASSIGNMENT OF LEASE AS DISCHARGE OF TENANT AND HIS SURETIES.—An assignment of a lease by the lessee does not discharge him or his sureties from the covenants contained therein even when the landlord recognizes the assignment by accepting rent from the assignee.

LANDLORD AND TENANT—DEFENSES BY TENANT'S SURETY AGAINST ACTION FOR RENT.—A surety for a tenant may set up, in defense to an action against him for rent, any matter that operates as a discharge of the tenant from liability upon the lease; but the landlord must create a new tenancy by agreeing to accept the subtenant or assignee of the lease as his tenant, and by accepting him in substitution for the original tenant before the latter or his sureties will be discharged.

LANDLORD AND TENANT—ESTOPPEL OF LANDLORD TO DENY SURRENDER. When it is mutually agreed between parties that a lease shall be surrendered, and a new one is thereupon made with another party, and the landlord accepts the new party as his tenant, this will estop the landlord thereafter from denying the surrender of the first lease.

PRACTICE—PRESERVING OBJECTION TO COMPETENCY OF EVIDENCE.—When a party fails to make any objection on the trial to the introduction in evidence of a judgment-roll, or any part of it, or to make any motion to exclude any part of it which is not competent, or to ask for any instruction limiting its effect, he cannot base an assignment of error on the admission of such evidence.

LANDLORD AND TENANT—RIGHT AND MODE OF RE-ENTRY BY LANDLORD. When a lease authorizes the landlord to re-enter in case of default in

the payment of rent, the fact that he re-enters after establishing his right to do so by action of forcible entry and detainer, instead of making a re-entry without obtaining a judgment of restitution, cannot be complained of by the tenant or his sureties.

ACTION by one Sibley against J. B. Grommes and M. Ullrich upon their contract of guaranty that one H. C. Donnelly would pay the rents and perform the covenants contained in a certain lease executed by Sibley to Donnelly of a certain building. Sibley died during the progress of the suit, and upon suggestion of his death the case proceeded in the name of his executors, the St. Paul Trust Company, and others. The plaintiffs obtained judgment, and the defendants appealed.

Hiler H. Horton, and Winston and Meagher, for the appellants.

Otis and Graves, for the appellees.

641 MAGRUDER, J. The main question, arising out of the assignment of errors as to the giving and refusal of instructions, has reference to the right of the lessor, or his executors, to recover for the rent which accrued after the lessor's re-entry into the possession of the demised premises. The lease provides that, if the lessee shall fail to make any of the payments of rent, or to fulfill any of the covenants of the lease, it shall be lawful for 642 the lessor to re-enter and take and hold possession "without such re-entry working a forfeiture of the rents to be paid . . . by the party of the second part . . . during the full term of this lease." It is contended by appellants, that a re-entry by the landlord for the default of the tenant puts an end to the lease, and that no accruing or subsequent rent can be recovered after the termination of the lease. The general rule is that eviction by the lessor suspends the rent. "Acts by the landlord, in interference with the tenant's possession, to constitute an eviction, must clearly indicate an intention on the part of the landlord that the tenant shall no longer continue to hold the premises." Such acts relieve the tenant from the payment of rent accruing after his possession ceases; but rent already accrued and overdue is not forfeited by the eviction. The rule, that eviction suspends the payment of rent, results from the meaning of the term rent, and from the obligations of the relation between landlord and tenant. Rent is compensation for the use of land, and what the tenant pays rent

for is quiet possession, or beneficial enjoyment. When, therefore, the use of possession ceases, the consideration for the payment ceases: 1 Taylor's Landlord and Tenant, 8th ed., secs. 377, 378; 2 Wood's Landlord and Tenant, 2d ed., sec. 477, page 1096, note 3; 12 Am. & Eng. Ency. of Law, p. 748; *Morris v. Tillson*, 81 Ill. 607; *Hall v. Gould*, 18 N. Y. 127; *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370.

But in the cases where the rule has been laid down and enforced, it does not appear that there was an express covenant or agreement on the part of the tenant, that he would be liable for the rents accruing up to the end of the term, notwithstanding the re-entry of the landlord before the expiration of the term for default in the payment of rent. Such cases are distinguishable from the case at bar in that, here, the lease, which is signed by the tenant, and under the terms of which he entered into possession of the demised premises, provides that ^{and} the re-entry by the landlord shall not work a forfeiture of the rents to be paid after such re-entry.

In some of the cases referred to the lease contains a stipulation that for any breach of covenant the lease shall "determine and be utterly void"; that is to say, void at the election of the lessor. Where there is such a stipulation in the lease entry by the landlord will be regarded as an exercise of his option to determine the lease: *Jones v. Carter*, 15 Mees. & W. 718; 1 Wood's Landlord and Tenant, 2d ed., sec. 226, pp. 479, 480. Where the landlord elects to determine the term he cannot have a recovery for subsequent rent: *Supra*. But there is no provision in the present lease that it shall determine and be void for failure to pay rent, or for a breach of any of the other covenants. On the contrary, the lease provides, in substance, that a re-entry and taking of possession by the landlord shall not have the effect of determining the lease, nor operate to prevent its continuing in force. No other meaning can be given to the words, "without such re-entry working a forfeiture of the rents to be paid . . . during the full term." There is nothing illegal or improper in an agreement that the obligation of the tenant to pay all the rent to the end of the term shall remain notwithstanding there has been a re-entry for default; and if the parties choose to make such an agreement we see no reason why it should not be held to be valid as against both the tenant and his sureties. The guarantors in this case agreed that the tenant should

pay all rents to be by him paid "according to the terms and conditions of said lease for and during the entire term thereof."

It may not be strictly accurate or correct to call the money to be paid after re-entry rent, or to treat the lease as in force after a re-entry. But the parties have a right to fix the amount of the rent to accrue according to the terms of the lease as the amount of damages to be paid by the tenant in case of a breach of his covenants. It can make but little practical difference whether the sum agreed to be paid be called rent ⁶⁴⁴ or damages. It may be regarded as damages for the purposes of this suit: *Hall v. Gould*, 13 N. Y. 127; *Underhill v. Collins*, 132 N. Y. 269.

In *Hall v. Gould*, 13 N. Y. 127, the lessor reserved the power in the lease to enter upon the premises for a breach of covenant, and "to relet the same for the benefit of the lessee." During the term the lessor sued in ejectment and recovered possession, and thereafter endeavored to re-let the premises for the remainder of the term, but failed to do so. It was there held that, although by the entry for condition broken the estate of the lessee was at an end, and rent as such could no longer accrue to the lessor from the lessee, yet the provision that the lessor, in case of re-entry, was to re-let the premises for the benefit of the lessee, indicated it to be the intention of the parties that the lessee should remain answerable for any loss of rent to the lessor; that there was nothing unreasonable in the agreement of a lessee to completely indemnify his lessor for any injury which might arise to him by the lessee's breach of his own agreement, and that the lessor could recover the sum to which he was entitled under the terms of the lease as indemnity for such injury, even though that sum was called rent, when in point of law it was not, strictly speaking, rent. If the liability of the lessee for rent accruing after re-entry by the lessor may be inferred from a provision authorizing the lessor to re-let for the benefit of the lessee, then there can be no doubt about the liability of the lessee for such subsequent rent under his express stipulation that the re-entry shall not work a forfeiture thereof.

We do not think that the provision in the lease against a forfeiture of the rents to be paid during the full term can be construed as authorizing the lessor to collect the subsequent rent both from the lessee named in the lease, and also from the tenant, to whom the lessor may re-let the premises. The

provision does not contemplate the collection of double rent; but the rent due from the original lessee is to be credited with ⁶⁴⁵ such rent as is realized from the re-letting. The lessor is entitled to such sum as shall be equal to the rents required by the terms of the lease to be paid during the full term, and not to any greater sum. In harmony with this view, the fourth instruction given for the plaintiff instructed the jury "to deduct from the amount of rents remaining unpaid, if any, under said lease for the remainder of said term such rents, if any, as they may find from the evidence the said Henry H. Sibley received from said premises during the remainder of said term," etc.: *Underhill v. Collins*, 132 N. Y. 269; *Heims Brewing Co. v. Flannery*, 137 Ill. 309.

It is assigned as error, that the trial court refused to receive the testimony of H. C. Donnelly, the lessee named in the lease executed to him by Henry H. Sibley. Donnelly was a "person directly interested in the event" of the suit. The suit was against his sureties or guarantors, and he was liable to respond to them for whatever might be recovered against them. The adverse parties suing at the time of the trial were Sibley's executors. Therefore, Donnelly was not a competent witness under paragraph 2 of chapter 51 of the Revised Statutes in regard to evidence and depositions, unless the transactions, which it was proposed to prove by him, come under some one or more of the exceptions to that paragraph. It is contended that his evidence was admissible under the fifth exception, which reads as follows: "When, in any such action, suit, or proceeding, the deposition of such deceased person shall be read in evidence at the trial, any adverse party or party in interest may testify as to all matters and things testified to in such deposition by such deceased person, and not excluded for irrelevancy or incompetency."

It is not claimed by appellants, that a deposition of the deceased, Sibley, was read in evidence; but in the judgment-roll of the forcible entry and detainer suit, brought by Sibley against Donnelly and Ruse in the municipal court of the city of St. Paul, the complaint therein set forth, sworn to by ⁶⁴⁶ Sibley, not only alleges that Donnelly made default in the payment of the rent due on June 1, and July 1, 1889, but also contains the allegation "that said defendant, D. P. Ruse, wrongfully and unlawfully entered into possession of said premises as the tenant or assignee of said defendant, Donnelly, without the knowledge or consent of said plaintiff, and

contrary to the terms and conditions of said lease." The contention is, that the introduction by the plaintiff executors of this sworn statement entitled the defendant guarantors to prove by Donnelly, as they offered to prove, that Donnelly sold the saloon upon the demised premises to Ruse about January 1, 1889; that Ruse then entered into, and remained in, possession thereof until he and Donnelly were served with a notice to quit by Sibley on June 23, 1889; that Ruse paid the rent from January 1st to June 1st to Sibley; that Sibley gave receipt therefor to Ruse, and thereby recognized the tenancy or subtenancy of Ruse.

The object of introducing the judgment of restitution rendered by the Minnesota court, and the writ of restitution issued thereunder, was to show a re-entry into the demised premises by the lessor for the default of the lessee in the payment of rent. For what purpose and to what extent a judgment against the principal may be introduced in evidence against the surety is a matter about which there is much contrariety of opinion in the decisions of the courts. Some of the cases hold that a judgment against the principal is *prima facie* evidence against the surety; but even these cases differ as to the character of the proof required to overcome the *prima facie* case, some announcing the law to be that, to avoid the effect of the judgment, the surety must show fraud, or collusion, or mistake, or payment: *Drummond v. Prestman*, 12 Wheat. 515; *Berger v. Williams*, 4 McLean, 577; others asserting for the surety the right to go behind the judgment against the principal, and make any defense to it which the surety might have made if he had been a party to it: *Bryant 647 v. Owen*, 1 Ga. 855; *Bradwell v. Spencer*, 16 Ga. 578. Some cases hold, that the judgment is conclusive evidence against the surety, but these will generally be found to be cases where the contract of the surety obligates him to be responsible for the result of a suit against his principal, or where he has been made privy to the suit against the principal by notice, and has been given an opportunity to defend it: 2 Brandt on Suretyship and Guaranty, secs. 630, 631, 632; 2 Black on Judgments, secs. 586 and 592; 1 Freeman on Judgments, sec. 180. The general tendency of the decisions is in favor of the position, that, in the absence of such notice and opportunity to defend, or of such assumed responsibility for the result of a court proceeding, the judgment against the principal is not conclusive against the surety, but can only

be introduced against him as evidence of its own existence, and not as evidence of any of the facts upon which its recovery rests: *Supra*. As to the latter it is *res inter alios acta*.

In the present case, the question whether appellants had notice of the suit against Donnelly and Ruse, and had an opportunity to defend that suit, is not presented for our consideration by either party. It does not appear, however, that they received any notice of the forcible entry and detainer suit until judgment therein had been rendered. They were residents of Illinois, and their attorney at St. Paul was absent from that city during the period when any notice by letter is shown to have been sent to him there. Under these circumstances we do not think that the judgment-roll was competent evidence, as against appellants, of the truth of the allegation sworn to by Sibley in the complaint, as the same is above quoted, or of the truth of the finding to that effect made by the Minnesota court. But while this is so, we do not think that appellants were entitled to introduce the testimony of Donnelly upon the matters and things embraced in their offer, even if it be assumed that the sworn complaint in the Minnesota suit can be regarded as the deposition of a deceased person.

448 The defendants below did not offer to prove that there had been any assignment of the lease by Donnelly to Ruse, but if they had proven, in contradiction of the allegation in the complaint, that the lease had been assigned or the premises had been sublet by the tenant with the consent in writing of the lessor, the guarantors would not have been thereby discharged from their liability. The lease in this case authorizes such assignment or subletting with the written consent of the lessor, and "the sureties knew or were bound to know this when they executed their guaranty": *Morgan v. Smith*, 70 N. Y. 537.

Nor did the sale of the saloon by the tenant to Ruse, nor the taking of possession by Ruse, nor the acceptance of rent from the latter by the landlord, operate as a discharge of the guarantors. The assignee of a leasehold estate is liable for the rent according to the terms of the lease, and the fact of his liability after the assignment does not discharge the lessee from his covenant to pay rent. In case the rent is not paid by the assignee as it becomes due, an action may be sustained against the lessee therefor; and it makes no difference, in this respect, that the lessor may have received rent

from the assignee, and accepted him as tenant of the premises: *Shaw v. Partridge*, 17 Vt. 626; 12 Am. & Eng. Ency. of Law, p. 739. Where there is an express covenant to pay rent for a term of years the mere acceptance of rent by the lessor from the assignee of the lessee does not discharge the lessee: *Harris v. Heackman*, 62 Iowa, 411. The contract of the latter continues in force, notwithstanding he may have parted with his interest in the estate, unless the lessor enters into such stipulations with the assignee, as to accept him as sole tenant and absolve the original lessee. If there be not a substitution of the assignee in place of the original lessee, and a clear intent to make a new contract with the former and to discharge the latter from further liability under the lease, both will be held liable to the lessor: *Way v. Reed*, ⁶⁴ 6 Allen, 364. Wood, in his work on Landlord and Tenant, says: "An assignment of a lease by the lessee does not discharge either the lessee or his surety from the covenants. It does not have this effect even when the lessor recognizes the assignment by accepting rent from the assignee": *Way v. Reed*, 6 Allen, 364; *Hunt v. Gardner*, 39 N. J. L. 530; *Almy v. Greene*, 13 R. I. 350; *Damb v. Hoffman*, 3 E. D. Smith, 361.

A surety for the tenant may set up, in defense to an action against him, any matter that operates as a discharge of the tenant from liability upon the lease. But the landlord must create a new tenancy by agreeing to accept the subtenant or assignee of the lease as his tenant, and by accepting such subtenant or assignee in substitution for the original lessee, before the latter will be discharged, and, by consequence, before the sureties of the latter will be discharged: *Damb v. Hoffman*, 3 E. D. Smith, 361; 2 Wood's Landlord and Tenant, secs. 470, 494, 495, pages 1083, 1084, 1178; *White v. Walker*, 81 Ill. 422; *Bailey v. Delaplaine*, 1 Sand. 5; *Grant v. Smith*, 46 N. Y. 95.) "Where it is mutually agreed between parties that a lease shall be surrendered, and a new one is thereupon made with another party, and the landlord accepts the new party as his tenant, this will estop the landlord thereafter from denying the surrender of the first lease": *Dills v. Stobie*, 81 Ill. 202; *Williams v. Vanderbilt*, 145 Ill. 238; 36 Am. St. Rep. 486.

But here the offer of the defendants as to what they propose to prove by Donnelly did not go far enough to show a discharge of Donnelly from his liability upon the lease. If such offered testimony had been received it would

not have tended to show a release of the defendants below as guarantors, and therefore its exclusion could have done no harm, particularly as Ruse was allowed to testify to all the facts and circumstances connected with the transaction. We fail to discover in the record that the defendants made any objection to the introduction of the judgment-roll or any part of it; or made any motion to exclude any portion of it which ^{case} was not competent; or asked for any instruction limiting its effect in the manner hereinbefore indicated.

It is urged that the verdict and judgment are not sustained by the evidence. This is an objection which we are not at liberty to consider, as the judgment of the appellate court is conclusive upon the questions of fact. The defendants asked the court, and the court refused to instruct the jury to find a verdict for them. We have looked into the evidence so far as to discover that there was testimony tending to support the verdict, and therefore the instruction was properly refused. As the other refused instructions asked by the defendants, whose refusal their counsel complain of, contravene the views already expressed, we do not think that their refusal is cause for reversal. The first instruction given for the plaintiffs left it to the jury to determine from the evidence whether the defendants as guarantors were lawfully released and discharged from their liability: *Bailey v. Delaplaine*, 1 Sand. 5. Some of the instructions given for the plaintiffs are objected to, because they are said to leave it to the jury to find from the evidence that the re-entry into the premises by the landlord was under a writ issued upon a judgment of restitution. The lease authorizes the lessor to re-enter in case of default; and we cannot regard it as a matter to be justly complained of, that he chose to re-enter after establishing his right to do so by a court proceeding, instead of making a re-entry without getting a judgment of restitution.

The judgment of the appellate court is affirmed.

Judgment affirmed.

LANDLORD AND TENANT—EVICTION—WHAT CONSTITUTES: See the extended note to *De Witt v. Pierson*, 17 Am. Rep. 62, also the notes to *George v. Putney*, 50 Am. Dec. 791; *Hawthorne v. Seigle*, 22 Am. St. Rep. 298, and *Smith v. Shepard*, 25 Am. Dec. 434. An eviction which will discharge a tenant from liability to pay rent is any act on the part of the landlord which will render the leased premises useless for the purposes for which they are rented: *Halligan v. Wade*, 21 Ill. 470; 74 Am. Dec. 108; *Royce v. Guggenheim*, 108 Mass. 201; 8 Am. Rep. 322, *Briggs v. Hall*, 4 Leigh, 484; 26 Am. Dec. Am. St. Rep., Vol. XXXVII. — 17

326; *Brown v. Holyoke Water Power Co.*, 152 Mass. 463; 23 Am. St. Rep. 344, and note.

LANDLORD AND TENANT—EFFECT OF EVICTION ON LIABILITY FOR RENT. Eviction of a tenant by paramount title is a good defense in an action for rent: *Smith v. Shepard*, 15 Pick. 147; 25 Am. Dec. 432; *George v. Putney*, 4 Cush. 351; 50 Am. Dec. 788, and note. Eviction in fact or in effect, which renders the premises useless to the tenant, may be set up in defense against a recovery for rent: *Halligan v. Wade*, 21 Ill. 470; 74 Am. Dec. 108, and note; *Poston v. Jones*, 2 Ired. Eq. 350; 38 Am. Dec. 683; *Martin v. Martin*, 7 Md. 368; 61 Am. Dec. 364; *Manville v. Gay*, 1 Wis. 250; 60 Am. Dec. 379, and note. Where a tenant is wrongfully evicted by the landlord, the measure of the tenant's damages is the rental value of the property for the unexpired term, less the amount of rent reserved by his lease: *Cannon v. Wilbur*, 30 Neb. 777. A lessor cannot recover rent falling due subsequent to his filing suit in ejectment against his tenant: *Coburn v. Goodall*, 72 Cal. 498; 1 Am. St. Rep. 75. See also the notes to the following cases: *De Witt v. Pierson*, 17 Am. Rep. 62, and *Giles v. Comstock*, 53 Am. Dec. 378.

LANDLORD AND TENANT—ASSIGNMENT OF LEASE—EFFECT OF TENANT'S LIABILITY FOR RENT.—A lessee continues liable on his covenants in the lease notwithstanding his assignment of it, because of the continuance of his privity of contract with the lessor: *Washington Natural Gas Co. v. Johnson*, 123 Pa. St. 576; 10 Am. St. Rep. 553, and extended note thoroughly discussing the subject. See also the note to *Coburn v. Goodall*, 1 Am. St. Rep. 63.

LANDLORD AND TENANT—LANDLORD'S ESTOPPEL TO DENY SURRENDER: See the notes to *Haynes v. Aldrich*, 28 Am. St. Rep. 639, and *Bedford v. Terhune*, 86 Am. Dec. 405.

WITNESSES—COMPETENCY—PRINCIPAL IN ACTION AGAINST SURETY.—A principal is incompetent as a witness, on the ground of interest in an action on a bond brought against his surety alone: *Pogue v. Joyner*, 6 Ark. 241; 42 Am. Dec. 693; *Jones v. Hays*, 3 Ired. Eq. 502; 44 Am. Dec. 78, and note. He is an interested and incompetent witness who has covenanted with the defendant to pay certain notes set off against the plaintiff: *Newton v. Booth*, 13 Vt. 320; 37 Am. Dec. 596. A principal is a competent witness for the surety to prove an agreement by which the liability of the latter is discharged: *Steele v. Boyd*, 6 Leigh, 547; 29 Am. Dec. 218.

SURETYSHIP—JUDGMENT AGAINST THE PRINCIPAL IS EVIDENCE AGAINST A SURETY: *Charles v. Hoskins*, 14 Iowa, 471; 83 Am. Dec. 378, and extended note fully discussing the subject; see the extended notes to *Stephens v. Shafer*, 33 Am. Rep. 802-804; *Robinson v. Boskins*, 22 Am. St. Rep. 204-207, and the note to *Douglas v. Ferris*, 34 Am. St. Rep. 447.

CASES

IN THE

SUPREME COURT

OF

KANSAS.

CARTER v. MOULTON.

[51 KANSAS, 2.]

ESCROW.—WRITTEN INSTRUMENT CAN BECOME AN ESCROW ONLY when placed in the hands of a person not a party to it. A note placed in the hands of one of several joint makers by the others, under an agreement among themselves with reference to its delivery, is not an escrow.

PRINCIPAL AND SURETY.—SURETY, WHEN BOUND BY DELIVERY BY PRINCIPAL.—If a surety signs and delivers to his principal an instrument perfect upon its face, with a condition that it is not to be delivered to the obligee, payee, or grantee until some person or persons who are agreed upon shall also execute it, and the principal delivers the instrument without regard to the condition and without knowledge thereof on the part of the obligee, payee, or grantee, the delivery binds the surety.

NEGOTIABLE INSTRUMENTS.—DELIVERY BY PRINCIPAL, WHEN BINDS SURETY. If a negotiable promissory note, perfect in form, executed by a number of persons, is intrusted to one of the makers by all, it is presumed that the party holding the note has authority to deliver it to the payee, and when the note is presented by such party to the payee without notice to the latter of any agreement between the makers affecting the right to so deliver it, the payee is justified in assuming that the parties who signed the note intended to be bound thereby, and may receive it and deliver to the principal the consideration therefor, and thereby bind the other makers, without first making inquiries of them for the purpose of learning whether or not there are any secret agreements affecting the instrument.

Jetmore and Jetmore, for the plaintiff in error.

W. H. Carpenter, for the defendant in error.

¹² **ALLEN, J.** This action was brought by **A. L. Moulton** on a promissory note, which reads as follows:

"\$600.

MARION, KAS., December 7, 1887.

"Nine months after date we promise to pay to the order of A. L. Moulton, at the Cottonwood Valley Bank, Marion, Kas., six hundred dollars, with interest at 12 per cent per annum until paid. Value received.

J. M. WISHART.

"R. E. KNAPP.

R. C. CABLE.

"C. E. FOOTE.

M. A. CARTER."

The defendant, M. A. Carter, filed her separate answer, which reads as follows (omitting title):

"Now comes the defendant, M. A. Carter, and for her separate answer herein says that the consideration of the note sued on by the plaintiff herein was for money borrowed by J. M. Wishart of and from the plaintiff, no part of which was ever had or received by this defendant; that this defendant is signed said note as surety only for said Wishart, all of which was at the time well known and understood by the plaintiff; that this defendant signed her name to said note only as an escrow, on the express condition that said Wishart, the principal in said note, would hold the same as such escrow, and not deliver it to the plaintiff until he, the said Wishart, should execute, in favor of said plaintiff, to secure the payment of said note and interest, a mortgage on his homestead in the city of Marion, county of Marion, state of Kansas, and upon that condition only did this defendant sign her name to said note, and not otherwise; and that defendant never delivered said note to plaintiff, nor authorized the same to be delivered, and if delivered by said Wishart, it was done without the authority or consent of defendant; that said Wishart failed, neglected, and refused to execute said mortgage on his homestead in favor of said plaintiff to secure the payment of said note and interest as aforesaid. Wherefore said note is not the act and deed of this defendant. Defendant having fully answered asks to be discharged, with her costs."

To this answer the plaintiff demurred, and the district court sustained the demurrer, and the plaintiff in error brings the case here to review that decision.

Counsel for the plaintiff in error contend that the note sued on was signed by the plaintiff in error as surety only upon an expressed condition, which was never performed, and that the plaintiff in error was, therefore, not liable; that the note is void because it was never delivered to the defendant in error by the plaintiff in error, or by her authority. It is conceded by the demurrer that the plaintiff knew the fact that M. A.

Carter signed the note as surety, but it is nowhere averred that the plaintiff knew of the agreement between M. A. Carter and the principal in said note with reference to the giving of a mortgage. The plaintiff in error contends that the delivery of the note by the surety to the principal after its execution by the surety under an agreement of the kind stated in the answer made the instrument an escrow, and that no validity could be given to it by a delivery in violation of the terms agreed on between the parties.

It is true that the holder of an instrument placed in escrow¹⁴ can give it no validity, generally speaking, by a delivery in violation of the agreement. In order to make the instrument an escrow, however, such delivery must be to a third person, not a party to the instrument: See Bouvier's Law Dictionary, and cases therein cited: *State v. Potter*, 63 Mo. 212; 21 Am. Rep. 440.

The note in this case was perfect in form at the time it was delivered to the payee. It is not claimed that the principal made any change in the form of the note nor in the signatures thereto after it was signed by the plaintiff in error. It is the fact that it was delivered in violation of a secret understanding between the principal and the surety, which plaintiff in error claims renders the note void in the hands of the payee, who, for anything that appears in the note, paid full value for it. Many authorities are cited by counsel to sustain the proposition that the note is void as to the surety, but none of them go so far as to sustain the plaintiff's position in an action brought on a negotiable promissory note. In the case of *People v. Bostwick*, 32 N. Y. 445, it is held that a bond delivered under similar circumstances is void as to the surety; and in the case of *Pauling v. United States*, 4 Cranch, 219, the same doctrine is held. The New York case comments on the difference in the rule with reference to the delivery of a deed and a delivery of a sealed instrument securing the payment of money, and also on the difference between a bond and a negotiable bill of exchange or promissory note.

In the case of *Merchants' Exchange Bank v. Luckow*, 37 Minn. 542, the delivery was to the agent of the payee; and in the case of *Perry v. Patterson*, 5 Humph. 133, 42 Am. Dec. 424, the delivery was to the attorney of the payee. None of the cases cited by counsel for plaintiff in error are directly in point. The doctrine contended for, even as applied to bonds,

is expressly denied, we think, by the weight of authority: See *Dair v. United States*, 16 Wall. 1; *State v. Potter*, 68 Mo. 212; 21 Am. Rep. 440; *State v. Peck*, 53 Me. 284. The precise point presented in this case is very fully considered by the supreme court of Indiana in the case of *Deardorff v. Foreman*, 24 Ind. 481, where it is held:

"If a surety signs and delivers to his principal an instrument ¹⁵ perfect upon its face, with a condition that it is not to be delivered to the obligee, payee, or grantee, until some persons who are agreed on shall also execute the same, and the principal delivers the instrument without regard to the condition, and the obligee, payee, or grantee has no knowledge of the delivery, the condition will bind the surety."

To the same effect also are the cases of *Gage v. Sharp*, 24 Iowa, 15; *Bonner v. Nelson*, 57 Ga. 438; *Fowler v. Allen*, 82 S. C. 229.

Where a negotiable promissory note, perfect in form, executed as in this case by a number of persons, is intrusted to one of the makers by all, we think there is a presumption that the party so holding the note has authority to deliver it to the payee. When a note so executed is presented by the principal to the payee without any notice to the payee of any understanding between the makers affecting the right of the principal to deliver to the payee, we think he is justified in assuming that the parties who so signed the note intended to be bound thereby, and that he may receive the note and deliver to the principal the consideration therefor, without first making inquiries of the other parties to the instrument for the purpose of learning whether there are any secret agreements or understandings affecting the instrument.

We see no error in the ruling of the court below, and the judgment will be affirmed.

All the justices concurring.

ESCROW—TO WHOM DELIVERY MUST BE MADE.—To constitute a writing an escrow it must be placed in the hands of a third person, to be delivered upon the happening of a contingency: *Wight v. Shelby R. R. Co.*, 16 B. Mon. 4; 63 Am. Dec. 522, and note; *Worrall v. Munn*, 5 N. Y. 229; 55 Am. Dec. 330, and extended note. For a delivery in the hands of a grantee is never valid as an escrow: *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68, and note; *Foley v. Cowgill*, 5 Blackf. 18; 32 Am. Dec. 49; *Hicks v. Goode*, 12 Leigh, 479; 37 Am. Dec. 677, and note; *Ordinary v. Thatcher*, 41 N. J. Eq. 403; 32 Am. Rep. 225; *Campbell v. Jones*, 52 Ark. 493; *Gaston v. City of Portland*, 16 Or. 255; *McAllister v. Muehner*, 68 Miss. 672.

SURETSHIP.—**SURETY BOUND BY DELIVERY TO PRINCIPAL OR HIS AGENT:** See *Nash v. Morgan*, 72 Ga. 517; 55 Am. Rep. 847; *Nash v. Fugate*, 32 Gratt. 586; 34 Am. Rep. 780; *Outler v. Roberts*, 7 Neb. 4; 29 Am. Rep. 371, and note; and *Quill v. Thomas*, 54 Ala. 414; 25 Am. Rep. 703, and extended note.

MYERS v. BOARD OF EDUCATION OF CLAY CENTER.

(51 KANSAS, 37.)

TRUST FUNDS—WRONGFUL CONVERSION—RIGHT TO RECOVER.—The confusion of trust funds wrongfully diverted does not entirely destroy the right to follow them. When they are traced into the assets of the unfaithful trustee, or of one who has knowledge of the character of the funds, they become a preferred charge upon the entire assets with which they are mingled, no matter whether such assets consist of money, bills, notes, and land, or other assets.

TRUST FUNDS—WRONGFUL CONVERSION OF—PREFERENCE OF BENEFICIARY OVER GENERAL CREDITORS OF TRUSTEE.—When trust money is wrongfully mingled with the funds of a trustee bank, and is used by it in the payment of its debts, after which the bank becomes insolvent, and makes an assignment for the benefit of creditors, the fact that the trust fund went into and swelled the volume of the assets of the bank gives the beneficial owner an equitable right to have his demand first paid out of the assets of the bank before distribution is made to its general creditors, although the trust money is not clearly traceable to any particular asset of the bank, and although its assets consist of money, securities, and lands.

TRUST FUNDS—MISAPPROPRIATION—TAKING COLLATERAL SECURITY AS AFFECTING RIGHT OF BENEFICIARY TO RECOVER.—When the trustee of a fund places it in a bank of which he is manager, and the bank, knowing the character of the fund, uses it in paying its own debts, and subsequently becomes insolvent, the fact that the beneficial owner of such fund accepts collateral security from the trustee for its repayment does not prevent the former from recovering the fund from the assets of the bank as against, and in preference to, its general creditors, who are not prejudiced by the taking of the security.

TRUST FUNDS—MISAPPROPRIATION—RIGHT TO RECOVER AGAINST INSOLVENT TRUSTEE.—If a trustee places the trust fund in a bank, and the bank, knowing its character, mingles it with its own funds, and, after using it in the payment of its debts, becomes insolvent, and assigns for the benefit of creditors, the beneficiary has a right to recover the trust fund from the assets of the bank in preference to its general creditors, although he fails to present his claim to the assignee for allowance.

ACTION by the defendant in error against the plaintiff in error as the assignee in insolvency of John Higinbotham, to recover three thousand two hundred and sixty-five dollars and seventy-one cents deposited by H. G. Higinbotham in the private bank of John Higinbotham prior to his insolvency,

and alleged to be a trust fund in the hands of said assignee. Judgment for the plaintiff. The defendant appealed.

Harkness and Godard, for the plaintiff in error.

C. C. Coleman, F. L. Williams, and B. B. Tuttle, for the defendant in error.

37 JOHNSTON, J. There is no doubt or question about the character of the moneys, amounting to three thousand and fifty-five dollars and seventy-one cents, sought to ³⁸ be recovered in this action. They were school funds, collected and held for specific public purposes, and the bank, its owners, and manager all knew of the trust character of the funds, and hence there is no excuse for their misappropriation. The treasurer of the board of education who placed these trust funds in the bank was its manager, and, without authority from the board of education, he mingled them with the funds of the bank, and used them in paying the creditors of that institution. At one time subsequent to the last deposit of school money the total amount of cash on hand in the bank was five hundred and forty-four dollars and fifteen cents, and subsequent to that time one thousand two hundred and thirty-six dollars and eight cents was drawn from the funds of the bank upon the order of the board of education. When the bank closed the whole amount of cash on hand was one thousand five hundred and thirty-five dollars and fifty-seven cents. It is said that no portion of this sum was the identical money received from the board of education, and that neither the money nor any specific property into which it had been converted can be clearly traced to the hands of the assignee. Under these circumstances has the board of education a preferred right over general creditors to the assets in the hands of the assignee? It is not denied that the school funds were impressed with a trust, and, if susceptible of identity, could be followed and reclaimed from the assignee. It is also admitted that if they could be traced into any other specific property the *cestui que trust* might claim such property, or a lien upon it; but it is insisted that unless the trust funds can be traced and identified the *cestui que trust* is to be treated as a simple creditor, and not entitled to an equitable preference in the distribution of the assets of the estate. The view of the plaintiff in error is not without support; and many of the older cases, while holding that a trust fund

wrongfully converted into another species of property of whatever form will be held liable to the rights of the beneficial owner in its new form, if its identity can possibly be traced, still adopt the old doctrine, stated by Judge Story, as follows: "The right to follow a trust fund ceases when the means of ascertainment fail, which, of course, is the case when the subject matter is turned into money, and mixed and ^{or} confounded in a general mass of property of the same description": Story's Equity Jurisprudence, sec. 259. The modern doctrine of equity, and the one more in consonance with justice is, that the confusion of trust property so wrongfully converted does not destroy the equity entirely, but that when the funds are traced into the assets of the unfaithful trustee, or one who has knowledge of the character of the funds, they become a charge upon the entire assets with which they are mingled. This principle was fully recognized, and the question in the present case was substantially decided, in *Peak v. Ellicott*, 30 Kan. 156; 46 Am. Rep. 90. In that case it was said:

"As the money was a trust fund, and never belonged to the bank, its creditors will not be injured if it is turned over by the assignee to its owner. Even if the trust fund has been mixed with other funds of the bank, this cannot prevent the plaintiff from following and reclaiming the fund; because, if a trust fund is mixed with other funds, the person equitably entitled thereto may follow it, and has a charge on the whole fund for the amount due."

It would seem to be immaterial whether the property with which the trust funds were mingled was moneys or whether it was bills, notes, securities, lands, or other assets. The bank which assigned in this case appears to have been engaged in a general business, and its assets consisted of moneys, securities, and lands; and, as the estate was augmented by the conversion of the trust funds, no reason is seen under the equitable principle which has been mentioned, why they should not become a charge upon the entire estate. In *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, an unfaithful trustee made an assignment, and among the assets there was a small amount of cash, and it was not shown that it was a part of the proceeds of the draft or trust fund. The question was whether the owner of the trust fund stood upon the same ground as the general creditors of the trustee, or whether he had a paramount right to be first paid out of the assets of the

estate. It was found that the proceeds of the trust property were used by the trustee either to pay off his debts or to increase his assets, and it was ¹⁰⁰ held to be unnecessary to trace the trust fund into any specific property in order to enforce the trust, and that, if it could be traced into the estate of the defaulting agent or trustee, that was sufficient. It was further decided, that whether the trust funds were used to increase the assets or to pay off the debts, in either case it would be for the benefit of the estate, and, having been so used, it was held that a trust attached to the entire estate which came into the hands of the assignee. The court in that case cites *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90, and expressly approves the doctrine of that case.

In *Independent District v. King*, 80 Iowa, 497, the treasurer of a school district, as in this case, wrongfully deposited the funds of the district in a bank, which knew the character of the funds. Subsequently the bank failed, and made an assignment for the benefit of its creditors. It was there insisted that, as none of the identical money deposited went into the possession of the assignee, no trust could be enforced against the estate of the assignor, to the prejudice of other general creditors. Speaking of the bankers, the court said that they—

“Were fully advised as to the material facts, and therefore could acquire no title to the deposit adverse to the plaintiff. As to them the money constituted a trust fund, which they had no right to convert to their own use; and the fact that they mingled it with other money, so that the identity of that deposited was lost, would not destroy the trust character of the deposits, nor prevent the enforcement of the trust against property to which they had contributed. To hold otherwise would be to ratify a willful violation of the law, at the expense of an innocent party, and thus perpetrate a wrong. The defendant (who was the assignee) acquired no property rights as against plaintiff which the Cadwells (the bankers) could not have enforced, and he had no special interest which requires protection. The same is true of the general creditors. They are entitled to only so much of the estate of the insolvents as remains after liens paramount to their claims and other preferred charges are satisfied.”

In *Davenport Plow Works v. Lamp*, 80 Iowa, 722, 20 Am. St. Rep. 442, the supreme court of Iowa considered the same question, in a case where the ¹⁰¹ trust funds had been used,

as in the present case, by the trustee for the payment of debts. The trustee having become insolvent and made an assignment, the assignee contended that the estate in his hands was not chargeable with the trust funds, but that the owner of the funds should be placed on an equal footing with general creditors, and only receive a *pro rata* payment out of the estate. The court said:

"The money was used by the Globe company in its business, and in payment of its debts. It became liable to the plaintiff to replace the trust funds with other money in its possession, or with money realized out of other property. Of course, the Globe company and its stockholders can urge no equity nor reason against the enforcement of these rules. Can its creditors? We think not, for these reasons: The money was wrongfully mingled, as it were, with the assets of the company. The money did not belong to the Globe company. The creditors, if permitted to enforce their claims as against the trust, would secure the payment of their claims out of trust moneys. If they are not permitted to do this, they are simply denied the remedy of enforcing their claims against property acquired by the use of trust money. They are deprived of no right, for the property acquired by the trust money became subject to the trust, and, therefore, could not have been subject to the claims."

In *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571, where trust money was wrongfully mingled with the funds of a bank which became insolvent and subsequently made an assignment, it was held that, although the trust money was not clearly traceable to any particular asset of the bank, the fact that it went into and swelled the volume of its assets gave the beneficial owner an equitable right to have his demand first paid out of the assets of the estate and before distribution was made to the general creditors. The same court in a later case held, that while it might

"Be impossible to follow the fund in its diverted uses, it is always possible to make it a charge upon the estate or assets to the increase or benefit of which it has been appropriated. The general assets of the bank having received the benefit of the unlawful conversion, there is nothing inequitable in charging ¹⁰² them with the amount of the converted fund as a preferred demand": *Stoller v. Coates*, 88 Mo. 514.

This principle of equity was approved by the supreme court

of the United States in *National Bank v. Insurance Co.*, 104 U. S. 54, where it was held that—

“If a man mixes trust funds with his, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies in every case of a trust relation, and as well to moneys deposited in bank, and to the debt thereby created, as to every other description of property.”

See, also, *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696; *People v. City Bank*, 96 N. Y. 32; *First Nat. Bank v. Hummel*, 14 Col. 259; 20 Am. St. Rep. 257; *Smith v. Combs*, 49 N. J. Eq. 420; *San Diego Co. v. California Nat. Bank*, 52 Fed. Rep. 59. These authorities are in line with *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90, and fully sustain the ruling of the district court in this case making the trust fund a charge on the assets in the hands of the assignee.

The court below held that the fact that the board of education sought and obtained some security from H. G. Higginbotham, who had been the treasurer of the board, for the payment of the money which he had misappropriated, did not prevent the board from following and recovering the trust fund. In this we see no error. As treasurer of the board, he was personally liable for the wrongful conversion of the money intrusted to him. The collateral security for the payment of the money was taken soon after the assignment was made, and before it was known whether the trust money could be reclaimed; and, probably, it was not then known whether there were sufficient assets against which the trust might be enforced. The taking of collateral security for the whole of the trust fund which the board was seeking to find, or for that part which they might ultimately fail to recover, does not appear to us to be inconsistent with the remedy sought in this action, and should not prevent it from insisting upon its equitable lien against the assets of the estate. The rights of no creditor of the bank have been prejudiced ¹⁰³ by the taking of the security, and it does not appear that any proceeding to enforce the same has been begun.

Another point made by plaintiff in error is that the board, having failed to present its claim to the assignee for special allowance, is precluded from availing itself of its equitable lien against the assets of the estate. This contention is based on the provisions of section 21 of the Assignment Act. It provides that the assignee shall give certain notice to

the creditors of the estate of the time for the presentation and allowance of demands; and further, that all creditors who, after being notified, fail to attend and present the nature and amount of their demands, shall be precluded from any benefit in the estate. This point cannot be sustained. Under the view which we have taken the board of education can hardly be regarded as a "creditor," within the meaning of the statute. The funds sought to be recovered were never the property of the bank. The title and beneficiary interest in the same remained in the board of education, so that the relation of debtor and creditor never in fact existed between the bank and the board: *First Nat. Bank v. Hummel*, 14 Col. 259; 20 Am. St. Rep. 257. But even if the board was to be treated as a creditor under this statute (which we need not decide now), it is not concluded by its failure to present a claim for the trust money to the assignee. No written notice as required by section 21 was given to the board of education, or any officer or member thereof, of the time when claims would be heard and allowed by the assignee. A notice was sent to H. G. Higinbotham, but at that time he was not the treasurer of the board. If the board of education is to be regarded as an ordinary creditor it should have been notified; and as the notice was not given there can be no claim that it is estopped to avail itself of the remedy which it is now seeking.

The judgment of the district court will be affirmed.

All the justices concurring.

TRUST FUNDS—CONVERSION—RIGHT OF BENEFICIARY TO FOLLOW AND RECOVER.—This question is thoroughly discussed in *Union Nat. Bank v. Goetz*, 133 Ill. 127; 32 Am. St. Rep. 119, and the extended note thereto; note to *Wetherell v. O'Brien*, 33 Am. St. Rep. 237; and *Holmes v. Gilman*, 133 N. Y. 389; 34 Am. St. Rep. 453, and note.

MATLACK v. SHAFFER.

[51 KANSAS, 202.]

DEEDS—CANCELLATION OF FOR FRAUD.—If a person living in the vicinity of a tract of land falsely represents to the owner living in another state, who is old, and feeble in body and mind, with no knowledge of the location or value of the land, that he has a valid tax title to it, and that unless the owner accepts a grossly inadequate sum offered and executes a conveyance to him he will never get anything, and the owner, relying upon these and other false representations as true, accepts the amount offered and executes the conveyance, he is entitled to have it canceled for fraud upon restoration of the amount so received and application seasonably made, although he might have discovered the fraudulent representations as to the tax title by a search of the records in the state where the land is situated.

J. F. McMullen and L. H. Webb, for the plaintiff in error.

Peckham and Peckham, for the defendant in error.

210 JOHNSTON, J. On January 19, 1887, B. W. Matlack sought and obtained a conveyance of 200 acres of real estate in Cowley county from George Shaffer and his wife, Elizabeth A. Shaffer. This action was brought by the Shaffers to cancel and set aside the deed of conveyance, upon the ground that it had been obtained by misrepresentation and fraud. The Shaffers, who resided in Baltimore, and were over 70 years of age, had never seen the land, and were not acquainted with its location and value. George Shaffer had inherited the land or an interest in the same from his nephew, who died in 1873, unmarried and without issue. Matlack lived in the vicinity of the land, and was acquainted with its conditions and value. Learning that the Shaffers had an interest in the land, he wrote to a gentleman in Maryland, on December 21, 1886, stating that he had recently bought a piece of land, and, in order to make the title absolutely good, he desired to obtain a quitclaim deed from the Shaffers. He told his agent to whom he wrote that their title did not amount to much, but he would be willing to pay them \$25 each, and would give the agent \$100 to perform the work. The agent replied that the Shaffers lived in Baltimore, and that if he would send him \$10 to pay expenses he would go to that place and look them up. The agent visited the Shaffers, and proposed to give them \$50 for a conveyance of the land, telling them that Matlack had a tax title to the same. The Shaffers declined to accept the offer, and their declination was reported to Matlack, who sent another letter

of advice to his agent, ³¹¹ directing him to tell the Shaffers that he held a title under a tax deed which was seven years old, and if there were any technical errors in the same they had been cured by the five-year statute of limitations. He directed the agent to offer them \$100, and if they would not accept that, to give them \$150 or \$200; and if they refused to take these sums, to state to them that he would commence an action against them to quiet title, in which event they would never get anything, and that these offers were made to save the trouble of a lawsuit, and to enable him to dispose of the land immediately. He inclosed a quitclaim deed partially filled out, advising him that he "must use a little stratagem in this, but do not miss the mark." In accordance with this advice, the agent again visited the Shaffers, and after considerable persuasion and pressure succeeded in getting them to sign the conveyance. The consideration for the same was \$200, while the land is conceded to be worth \$6,000 or over, and the interest of George Shaffer therein is worth at least \$1,500. At that time Matlack had no tax title whatever to the land, nor did he hold any tax lien on the same, neither had he any possession of the land then or at any other time. The possession and occupancy of the same were in another, who claimed title by a deed purporting to be from the sole heirs of the former owner. •

The court below found that the execution of the conveyance had been procured by false and fraudulent representations, upon which the grantors relied, and but for which it would not have been executed. We think the testimony justifies the finding, and that the judgment should stand. George Shaffer, by reason of age and illness, was feeble in mind and body at the time the conveyance was obtained, and it is clear that he was deceived and overreached through the false representations made to him. He knew nothing as to the tax liens or claims upon the land, nor was he acquainted with the tax laws of Kansas. Matlack, through his agent, represented to him that he had a tax title which was good, and if there were any defects or technical errors therein they ³¹² had been cured by the lapse of time. He was also told that it would cost him a large sum of money to send an attorney or other person out to investigate the matter, and that an action would be begun against him; and the agent told him that from what he knew the tax title was good, and that if he did not accept the \$200 he would never get anything. This

agent in his testimony states that Shaffer would not have signed the deed if it had not been for these representations. More than that, he was told and led to believe that the description in the deed covered only 160 acres of the land, and, attention being called to the extent of the land, the agent confirmed that belief. Shaffer specially objected to signing the deed if it contained more than 160 acres. He then employed Matlack's agent to look up and care for his title and interest in the remaining 40 acres, which he supposed were not included in the instrument of conveyance. It thus appears that he was led to believe that Matlack had a good title to the land, and that, by possession and the running of the statute of limitations, his own interest was of little or no value. But for these misrepresentations, he would not have executed the conveyance for any such trifling consideration. Some of the misrepresentations made by Matlack were of fact, and some of them were of fact based on law. They were untrue, and calculated to mislead the Shaffers, who did not have the knowledge or opportunity to know the truth of the representations made. While they were ignorant, Matlack had superior means of information, and by the misrepresentations obtained an undue advantage, from which the Shaffers were entitled to relief.

It is claimed that Matlack's statement with reference to the tax deed was not wholly untrue. It appears that the land had been sold for taxes, and it was claimed that the person who had obtained a tax deed had agreed to share his title with Matlack. The testimony with respect to this is not satisfactory, and is of little value as a support for Matlack's claim. It appeared that the tax sale upon which the tax deed was issued was only for one-fourth of the 160 acre tract, and ²¹² for 19 acres of the 40 acre tract, and Matlack claimed that the tax title covered the whole of both tracts.

It is also said that the Shaffers had no right to rely upon Matlack's statement that he had a tax deed, because it was a matter of public record, of which they were bound to take notice. The facts with reference to the title and Matlack's rights to the land were not equally within the knowledge of both parties, or the means of acquiring knowledge possessed by both. The Shaffers were nonresidents, and more than a thousand miles from the land and the public records pertaining to it, while Matlack was acquainted with the land and the records, and also knew of the ignorance of the Shaffers re-

specting the title. In the absence of any personal knowledge, the Shaffers were, under all the circumstances, justified in relying on Matlack's representations. They had no immediate means of learning the facts by an examination of the records, and as Matlack knew the statements to be untrue, and it appears that they have been relied and acted upon as true by the Shaffers, they are entitled to recover, although they might have discovered the fraud by searching the records: *Claggett v. Crall*, 12 Kan. 393; *McKee v. Eaton*, 26 Kan. 226; *Curtis v. Stilson*, 38 Kan. 302; *David v. Park*, 103 Mass. 501; *Safford v. Grout*, 120 Mass. 20.

The Shaffers tendered a return of the \$200 paid to them when the deed was executed, and, upon the whole record, we think the district court made no mistake in its conclusion that the deed should be canceled and set aside.

Its judgment will be affirmed.

All the justices concurring.

EQUITY—CANCELLATION OF DEEDS PROCURED BY FRAUD.—Equity will cancel a deed where the vendee of the lands has been guilty of deception and has made misrepresentations with the intention of deceiving the vendor and has concealed from him a material fact upon which he relied; *Morgan v. Dingee*, 23 Neb. 271; 8 Am. St. Rep. 121, and note; *Lawrence v. Gayetty*, 78 Cal. 126; 12 Am. St. Rep. 29, and note. See a full discussion of this subject in the extended note to *Gant v. Hunsucker*, 55 Am. Dec. 411.

HAZEL v. LYDEN.

[51 KANSAS, 223.]

EXECUTION SALES—ESTOPPEL TO DENY VALIDITY OF.—If land sold under a void execution and sale is purchased by a party who in good faith pays all it is reasonably worth, and enters into quiet and peaceable possession of the land, which he occupies for a number of years, making valuable improvements thereon, the owner, who resides in the near vicinity, is present at the sale, and receives the proceeds thereof without objection to such possession and occupancy, is estopped to deny the title of such purchaser, or to recover the land, although at the time of the sale he did not know that it was void.

EXECUTION SALES—ESTOPPEL TO DENY VALIDITY OF.—If one stands by and allows another to purchase his property in good faith at a void execution sale, and accepts the proceeds of the sale without giving the purchaser any notice of his title, he is thereby estopped to assert his title on the ground of his ignorance of the invalidity of the sale.

Garver and Bond, and Ira E. Lloyd, for the plaintiff in error.

O. B. Daughters and D. Ritchie, for the defendants in error.

²²⁶ HORTON, C. J. Ejectment brought by Patrick and Daniel Lyden against N. Hazel, to recover the possession of the west half of the northwest quarter and the west half of the southwest quarter of section 24, township 13, range 8, in Lincoln county, in this state. John Lyden, deceased, who died in February, 1875, was the owner in fee simple in his lifetime of the land described, the title of which is in dispute. At his death, being unmarried, he made, by his last will and testament, his sister, Mrs. Mary Cannon, formerly Mary Lyden, his sole heir. On March 29, 1875, Mrs. Cannon sold and conveyed the land to her brothers, Patrick and Daniel Lyden. In May, 1876, Ellen McInnery obtained judgment in the district court of Lincoln county against the estate of John Lyden, deceased, for one hundred and sixty dollars, including costs. This judgment was filed as a claim against the estate of John Lyden, deceased, in the probate court of Lincoln county. On July 31, 1876, the probate court issued execution, directed to the sheriff of that county, to collect the judgment and costs out of the property or estate of John Lyden, deceased. The sheriff received the execution on July 31, 1876, and on August 5, ²²⁷ 1876, the property was appraised at six hundred and forty dollars. On September 7, 1876, the land, after having been advertised, was sold by the sheriff to L. E. Farnsworth for six hundred and ten dollars. The sale was confirmed, and Farnsworth received a deed, which was recorded on December 11, 1876. On December 8, 1879, L. E. Farnsworth conveyed the land to A. E. Doolittle, and on July 17, 1882, Doolittle conveyed the land to N. Hazel, defendant below.

Assuming that the sale to Farnsworth, on September 7, 1876, was grossly irregular or void, the question for us to determine is, whether the Lydens were estopped, at the commencement of this action, from questioning the sale to or the title obtained by Farnsworth, under whom Hazel claims title. L. E. Farnsworth purchased the land in good faith, and paid the sheriff at the time of the sale all that it was reasonably worth. After Farnsworth purchased the land, Patrick Lyden quietly and without objection gave up to him possession of the same. At the time of the sale by the sheriff, Patrick Lyden was administrator of the estate of John Lyden, deceased, and was at all times the agent of his brother, Daniel Lyden. After the sale, Patrick Lyden received the proceeds thereof, applied a part to the payment of claims against the estate of John Lyden, deceased, including

a claim which he had against the estate, and the surplus of such proceeds he retained for Daniel Lyden and himself, as assignees of Mrs. Cannon, the devisee of John Lyden, deceased. He knew when the land was levied upon under the execution by the sheriff, and was present at the sale, but made no protest. He, however, did not know that the sale was grossly irregular or void until a short time before this action was commenced. After the sale, Farnsworth and his subsequent grantees occupied and made valuable improvements upon the land, with the knowledge of Patrick Lyden and without any objection from him, although Lyden resided all the time within two miles of the premises. This action was brought on the 28th of August, 1888, nearly twelve years after the sale by the sheriff to Farnsworth.

229 The Lydens, having retained the proceeds of the sale, six hundred and ten dollars, the reasonable value of the land, still ask to recover the land. There can be no doubt that the Lydens, after they received the proceeds of the sale of the land, would be estopped from denying the title of Hazel, acquired from Farnsworth, if, when they received the money, they knew, not only that it was a part of the proceeds of the sale, but also the circumstances which rendered the sale grossly irregular or void; but the jury found that the Lydens did not know that the sale of the land was void at the time it was made, and it is contended that such knowledge was necessary to create an estoppel. And further, it is contended that the Lydens have not lost their right to deny title or claim possession by their conduct or laches. But it seems to us that if the Lydens received the proceeds of the sale, or a part thereof, even without knowledge that the sale was void, and continue to keep the money after acquiring it, an estoppel will likewise continue. They ought not to be permitted to repudiate the sale made by the sheriff and at the same time insist upon having the benefit of the proceeds, or a part thereof: *Brewer v. Nash*, 16 R. L. 458; 27 Am. St. Rep. 749; *Maple v. Kussart*, 53 Pa. St. 348; 91 Am. Dec. 214. But further than this, the general rule is that "ignorance of the law, with a full knowledge of the facts, cannot generally be set up as a defense; nor will it protect a party from the operation of the rule of equity, when the circumstances would otherwise create an equitable bar to the legal title: *Storrs v. Barker*, 6 Johns. Ch. 166, 10 Am. Dec. 316. The doctrine

of this case was afterwards considered in *Tilton v. Nelson*, 27 Barb. 595, and, in the opinion by Emmott, J., he says: "The question is presented whether ignorance of the law will prevent the application of the rule of equitable estoppel"; and referring to the decision in the principal case, he says that, when a party thus asserts his ignorance of his title to avoid an estoppel, he encounters two principles of law of general application. "The first of these principles is, that when a party procures or even acquiesces in the disposition of his property by another, under color of title, and pretending to ²³⁹ title, he shall be bound by such disposition, and shall be presumed to know the law so far as it is applicable to the case. The other is, that even if he shows that he was really ignorant of the law, and acted in ignorance, still the maxim *ignorantia legis neminem excusat* will apply in favor of the other party": *Storrs v. Barker*, 10 Am. Dec. 325, 326, and notes.

In *Smith v. Cramer*, 39 Iowa, 413, one who pleaded a judgment, in honest ignorance that it was void, was nevertheless held to be estopped from availing himself of a mistake of his legal rights. A strong case holding the same doctrine is *Maple v. Kussart*, 53 Pa. St. 348; 91 Am. Dec. 214. There it appeared a husband and wife were seised of an estate by entireties. The husband in his will directed the land to be sold, and the proceeds to be divided among his wife and children. Having named no one to make the sale, the land was sold under an order of the orphans' court, and bought by two of the children, at the request of the widow, who received her share of the proceeds in accordance with the will. After her death, in ejectment for the land by some of the heirs, it was held that they were estopped by her acts, and that the estoppel would operate notwithstanding she was ignorant of her legal rights. A somewhat similar decision was made in a more recent case, *Cox v. Rogers*, 77 Pa. St. 160.

In *Reichert v. Voss*, 78 Ga. 54, the chief justice, speaking for the court, said:

"The sale, too, occurred at a wrong time and place, and, as a constable's sale proper, counts for nothing. But we hold with the court below that after the active part taken by Mr. Reichert in promoting the rendition of these judgments and the making of a sale under them he is estopped from pursuing the property in the hands of a purchaser who has bought honestly and parted with his money. If the notary and the constable had not been officers at all, but only private per-

sons, and if Reichert had authorized one to give judgment and the other to enforce it against his property (he accepting property for storage after seizure and aiding to promote its removal to the place of sale) he would have been bound by the transaction."

²⁴⁰ In *Smith v. Warden*, 19 Pa. St. 424, it was decided that "Equitable estoppels have place as well where the proceeds received arise from a sale by authority of law as where they spring from the act of the party, and the application of the principle does not depend on any supposed distinction between a void and a voidable sale."

In *Mitchell v. Freedley*, 10 Pa. St. 208, it was held that where a sheriff's sale was confirmed without objection, the application of the proceeds to the debts of the defendant in the execution "is the same thing as if paid to himself." It is fully settled, upon principle and authority, that where a sale is made for the benefit of anyone, the receipt of the proceeds by such person validates it. In such a case the supposed distinction between a void and a voidable sale is immaterial": *Wilson v. Bigger*, 7 Watts & S. 111; *Crowley v. Meconkey*, 5 Pa. St. 176; *Stroble v. Smith*, 8 Watts, 280; *Spragg v. Shriver*, 25 Pa. St. 282; 64 Am. Dec. 698.

In *Gray v. Crockett*, 35 Kan. 66, this court decided that, "If one stands by and allows another to purchase his property without giving him any notice of his title, a court of equity will treat it as fraudulent for the owner to afterward try to assert his title." See also *Hardin v. Joice*, 21 Kan. 318; *Kothman v. Markson*, 34 Kan. 542.

It is urged upon the part of the Lydens that the west half of the southwest quarter was never levied upon, never appraised, never advertised, and never sold. It is admitted, however, that this eighty acres of land was included in the sheriff's deed, recorded December 11, 1876, and, considering all the testimony in the record, it is clearly shown that this eighty acres was paid for by Farnsworth and taken possession of by him under the sale. Therefore both eighty acres must be treated as similarly situated, and controlled by the doctrine of estoppel. It is possible that there is a clerical error in the execution and return embraced in the record; but whether there is or not, there is sufficient other testimony tending to show that if an equitable estoppel applies to one eighty acres of land it does to the other eighty.

²⁴¹ The judgment of the district court will be reversed and

the cause remanded, with direction to the court below to enter judgment upon the special findings of fact for the defendant below and against the plaintiffs below.

All the justices concurring.

EXECUTION SALES—ESTOPPEL TO DENY VALIDITY OF.—One who has received the benefits derived from the proceeds of a judicial sale may be estopped to deny its validity: *Woodstock Iron Co. v. Fullensider*, 87 Ala. 584; 13 Am. St. Rep. 73; *Fallon v. Worthington*, 13 Col. 559; 16 Am. St. Rep. 231, and note. A mortgagor retaining the proceeds of a mortgage sale is estopped to deny the validity of the purchaser's title: *Brewer v. Nash*, 16 R. I. 488; 27 Am. St. Rep. 749. A defendant in execution will estop himself from impeaching a sheriff's sale by voluntarily surrendering possession and executing a release: *Spragg v. Shriver*, 25 Pa. St. 282; 64 Am. Dec. 698.

JONES v. KELLOGG.

[51 KANSAS, 263.]

APPELLATE PROCEDURE—EXTRINSIC EVIDENCE TO SUPPLY DEFECTS IN THE RECORD.—When a case is presented to the appellate court upon a case made and not upon a transcript, the rulings of the lower court complained of and assigned as error must be disclosed by, and embodied in, the case itself, and cannot be shown by extrinsic evidence, not even by the certificate of the judge, but it may be shown by extrinsic evidence that the case was made and served within proper time and that it was properly settled and signed in time by the trial court although this is not shown by the case itself or by any certificate of the court.

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES—VOID CHATTEL MORTGAGES.—When an insolvent debtor executes chattel mortgages upon some of his property to secure certain preferred creditors, and at the same time, and as a part of substantially the same transaction, executes an assignment of all of his property for the benefit of all of his creditors, subject however to such chattel mortgages, the latter are void, although the debtor may have previously promised without consideration that in case of trouble he would secure the preferred creditors. The deed of assignment is valid, and vests all of the property in the assignee.

ASSIGNMENT FOR BENEFIT OF CREDITORS—DAMAGES IN TROVER FOR CONVERSION OF ASSIGNED PROPERTY.—When an insolvent debtor executes a deed of assignment of all his property for the benefit of all his creditors, subject to certain chattel mortgages preferring certain creditors, executed at the same time and as part of the same transaction, and the assignee after taking possession of all the property, delivers the possession of the part mortgaged to the mortgagees, under the belief by all of the parties that the mortgagees have a prior right thereto, the latter, while in quiet and exclusive possession, can hold the property against everyone except the assignee or those claiming under him; and if creditors of the original owner cause the property to be taken from the pos-

session of mortgagees as the property of such owner under their writ of attachment, the attaching officer is a mere trespasser and as such liable to the mortgagees for damages amounting to the full value of the property in an action in the nature of trover for its conversion.

B. P. Waggener, D. Martin, and J. W. Orr, for the plaintiffs in error.

J. D. McFarland and W. C. Webb, for the defendants in error.

370 HORTON, C. J. This case was brought to this court from the district court of Shawnee county, upon a petition in error and a case made for the supreme court; and the first question presented by either party is, whether this court has any jurisdiction to hear and determine the case. The case was properly settled and signed by the trial judge, and was properly attested by the clerk, and the seal attached; but it is nevertheless claimed by the defendants in error, plaintiffs below, that such judge had no power or jurisdiction to settle or sign the same; and this for the plausible reason that it is not shown that the case was made and served upon them within the time prescribed by law, or by any order of the district court or the judge thereof. It appears from the record and papers brought to this court, that, after the trial in the court below ³⁷¹ a motion was made by the defendants below, plaintiffs in error, for a new trial and overruled on June 10, 1889, and sixty days thereafter were given to the defendants below within which to make and serve a case for the supreme court. On August 5, 1889, the time for making and serving the case was extended to September 19, 1889; and on September 16, 1889, the time for making and serving the case was still further extended for thirty days from September 19, 1889; and the case was made and served by counsel for the defendants below on counsel for the adverse party on September 24, 1889; and it was duly settled and signed by the judge of the district court and properly attested by the clerk thereof on November 17, 1889, the parties on both sides being present.

There is no claim now made that the case was settled or signed prematurely, but really the only claim of irregularity now made is, that the case was not served upon the adverse parties within the time prescribed by law, or as fixed by any order of the judge of the district court; and the ground upon which this claim is made is, that the order of the trial judge, made on September 16, 1889, extending the time for making

and serving the case for thirty days from September 19, 1889, is not incorporated in the case as settled and brought to this court, and, therefore, that it cannot be considered by this court. A regular certified copy of such order, however, on a separate piece of paper, has been brought to and filed in this court, and was presented to this court at the time of the hearing of the case. Besides, the district judge, in settling and signing the case, also certified, among other things, as follows: "Said case was served within the time allowed by me"; and the certificate containing these words, signed by the judge, attested by the clerk and the seal, is the only thing connected with the case made that shows it was ever settled or signed by the judge. Unquestionably the case was made and served upon the adverse parties within proper time; and unquestionably the district judge had the power, the jurisdiction, and the right to settle and sign the same as he did; but it is claimed that, as the case ³⁷³ itself does not show this, and that as the same is shown only by a certified copy of the original order of the district judge extending the time for making and serving the case, and by the certificate of the district judge himself made when he in fact settled and signed the case, along with evidence of the first two extensions in the case made, it must be conclusively held that the case was not made or served upon the adverse parties within proper time, and therefore that the settling and signing of the case by the district judge was without jurisdiction and a nullity. We would think differently, however. While it has always been held by this court, where the case has been brought to this court upon a case made and not upon a transcript, that the rulings of the lower court or of the judge thereof complained of and assigned for error must be shown by and embodied in the case itself, and that they cannot be shown by any other or by extrinsic evidence, not even by the certificate of the judge himself, yet we have about as uniformly held that all other matters or things to make the case reviewable may be shown by extrinsic evidence, or, in other words, by evidence outside of the case made. The decisions, however, of this court upon this subject have seldom been reported, for usually, in overruling a motion to dismiss a petition in error upon the ground that the case upon which it was founded had not been made and served within proper time, or was otherwise irregular, the court has overruled the motion without delivering any written opinion upon the question. The fol-

lowing reported decisions, however, have some application to this case: *Gross v. Funk*, 20 Kan. 655, 656; *Russell v. Anthony*, 21 Kan. 450; 30 Am. Rep. 436; *Farlin v. Sook*, 26 Kan. 397; *Pierce v. Myers*, 28 Kan. 364; *Wilson v. Janes*, 29 Kan. 233, 244 et seq.; *Dunn v. Travis*, 45 Kan. 541. In the case of *Russell v. Anthony*, 21 Kan. 450; 30 Am. Rep. 436, the following language was used:

"A case is brought to the supreme court on a petition in error and case made for the supreme court. Such case made shows upon its face that the case was settled and signed by the judge of the court below five days before the time had arrived ²⁷³ for so settling and signing such case; and the case made does not show whether the case was ever served upon the opposite party or his attorney, or whether the opposite party or his attorney had any notice thereof, or whether the opposite party or his attorney was present at the time when such case was settled and signed; but evidence was introduced in the supreme court satisfactorily showing that the case was properly served upon the attorney of record of the opposite party, who then said it was 'all right,' and who was afterward present when the case was settled and signed, and made no objection thereto. *Held*, That such case will be treated as a valid case made for the supreme court."

In the case of *Farlin v. Sook*, 26 Kan. 397, the plaintiff in error was permitted to show by extrinsic evidence that the case was made and served within proper time, although it was not so shown by the case itself, or by any certificate of the judge who settled and signed the same. In the case of *Dunn v. Travis*, 45 Kan. 541, it was permitted to be shown by evidence outside of the record that the judge of the district court, when settling and signing the case, was outside of the state, and therefore had no jurisdiction to settle or sign such case. A want of jurisdiction may be shown by extrinsic evidence, even to impeach a judgment: *Martin v. Gray*, 19 Kan. 458, etc.; 27 Am. Rep. 149, and cases there cited; *Reynolds v. Fleming*, 30 Kan. 106, 111; 46 Am. Rep. 86, and cases there cited. And certainly, if a judgment of a court of general jurisdiction may be impeached for a want of jurisdiction by extrinsic evidence, and the judgment held to be void upon such evidence, it would seem that any order or judgment of such a court might be sustained and upheld upon a showing of jurisdiction made by the same kind of evidence. We think it has been properly shown in this case that the case

brought to this court was made and served within proper time, and that it was properly settled and signed by the judge of the district court, and therefore the motion of the defendants in error to dismiss the case from this court will be overruled; and we shall now proceed to consider the case upon its merits.

It appears that, during the month of November, 1886, L. ²⁷⁴ B. Townley, who resided at Harper, in Harper county, was engaged in the mercantile business at that place, and at Norwich, in Kingman county, having a general stock of goods and merchandise at each place, and of the aggregate value of about \$15,000. A large number of persons constituting the partnership firm of Charles P. Kellogg & Co. were then and are still merchants engaged in the wholesale clothing business in the city of Chicago. At that time Townley owed Charles P. Kellogg & Co. about \$4,783.47. On November 17, 1886, C. H. Hunt, an agent of such firm, demanded payment of the amount from Townley, and also demanded security. Townley did not pay the amount, nor any part thereof, but agreed with Hunt that in case of any trouble he would secure the firm's claim; and on the same day Hunt employed Sam S. Sisson, an attorney at law at Harper, to attend to and protect the firm's claims and interests, and get security from Townley in case any trouble should arise; and he communicated Townley's agreement to Sisson. Afterward, and on November 29, 1886, Townley executed two chattel mortgages upon his said two stocks of goods and merchandise, and a general assignment of all his property, as follows: 1. A chattel mortgage upon his two stocks of goods to Belle Mevy Townley, his wife, to secure an indebtedness to her of \$6,800; 2. A chattel mortgage upon his two stocks of goods to Charles P. Kellogg & Co., to secure his aforesaid indebtedness of \$4,783.47 to them, subject, however, to the first mortgage to Mrs. Townley; 3. A general deed of assignment to Alf. H. Adams of all his property for the benefit of all his creditors, the assignment, however, to be subject to both the foregoing mortgages. The court below, with regard to the execution of these mortgages and this assignment, found, among other things, as follows:

"That the circumstances attending the execution of said mortgages and deed of assignment were as follows: On the evening of November 28, 1886, L. B. Townley went to the office of Sam S. Sisson, an attorney, and told him that he

had heard rumors that his creditors were threatening to attach his ²⁷⁵ (Townley's) stock, and he wanted to put his property in such shape that his creditors would be protected, and not have it eaten up in costs. After discussing the matter, Townley asked Sisson to draw the mortgage on said two stocks of goods: 1. To secure the debt of his wife of \$6,800; 2. A mortgage to Charles P. Kellogg & Co., on the same property, to secure their claim of \$4,783.47; and 3. A general deed of assignment to one A. H. Adams. That thereupon said Sisson drew the aforesaid mortgage to Belle M. Townley, his wife, to secure said sum of \$6,800, and thereupon L. B. Townley executed the same; and thereupon and immediately afterwards said Sisson drew the aforesaid mortgage to Kellogg & Co., to secure their claims of \$4,783.47, and thereupon L. B. Townley executed that mortgage; and immediately afterwards said Sisson drew the aforesaid deed of assignment, which said Townley then executed. All of said papers were left in possession of said Sam S. Sisson until next morning. On the next morning, November 29, 1886, said Sisson sent for A. H. Adams, the assignee named in said deed of assignment, who arrived at Sisson's office about five o'clock in the morning and met L. B. Townley and Sisson there. Adams was informed of the assignment, and was asked if he would accept. He replied that he would, and thereupon signed a written acceptance of the trust, and indorsed, as appears on the copy of said deed. Thereupon said Sisson handed said papers to said Adams in the following order: 1. The mortgage to Belle M. Townley; 2. The mortgage to Kellogg & Co.; and 3. The deed of assignment; and requested and instructed said Adams to take them to Anthony, Kansas, and have them filed for record in the order in which he had them handed to him, to wit: 1. The mortgage to Belle M. Townley; 2. The mortgage to Kellogg & Co.; and 3. The deed of assignment. At the time said Adams was asked to accept said trust, and had him sign the acceptance, he had no actual knowledge of the execution of said mortgages, but did have such knowledge immediately thereafter when the papers were handed to him."

The mortgage and deed of assignment were properly filed for record, and Adams, the assignee, took the possession of all the mortgaged and assigned property, and held it all until December 7, 1886. Afterwards, various attachments were issued from the circuit court of the United States and the dis-

strict ²⁷⁶ courts of Harper and Kingman counties, and all the mortgaged property was taken on such attachments from Charles P. Kellogg & Co. A portion of the mortgaged property is now the subject of this controversy. That portion which is now in dispute was a part of the stock of goods kept at Harper. On December 16, 1886, it was taken upon two writs of attachment issued from the United States circuit court in favor of two different plaintiffs and against Townley, and it was taken by W. C. Jones, the United States marshal, and T. W. Thompson, a deputy United States marshal, and the portion thus taken was of the value of \$4,600. About July 28, 1887, Mrs. Townley executed an instrument in writing to Charles P. Kellogg & Co. in substance giving to their mortgage priority, and giving to them the prior rights in and to the mortgaged property. There is some question as to whether this instrument was ever properly delivered to Charles P. Kellogg & Co. or not. On January 10, 1888, Charles P. Kellogg & Co. commenced this present action in the district court of Shawnee county against W. C. Jones and T. W. Thompson for \$7,000, as damages claimed to have resulted from the alleged wrongful and unlawful seizure of the property by Jones and Thompson. The case was afterwards tried before the court without a jury, and the court made special findings of fact and conclusions of law, and upon such findings and conclusions rendered judgment in favor of Charles P. Kellogg & Co., and against Jones and Thompson, for \$4,600, with interest amounting to \$778; total, principal and interest, \$5,378, and for costs of suit; and the defendants, as plaintiffs in error, bring the case to this court for review.

No real or actual fraud was shown in the case to invalidate either of the mortgages or deed of assignment, or to uphold the writs of attachment under which the defendants below acted; hence the plaintiffs below claim that the mortgages and deed of assignment are unquestionably valid; and that, under their mortgage and their possession, they had the prior right to the property, and that Mrs. Townley came second and the assignee third, and that the defendants below had ²⁷⁷ no right as against any person whatever; while the defendants below, plaintiffs in error, claim that, as the two mortgages and the deed of assignment were executed substantially at the same time and substantially as parts of the same transaction, they were and are all utterly void; and, therefore, that as they, the defendants below, actually obtained

the possession of the property and held the same under the writs of attachment, they had the better right to the property, whether there was any real or actual fraud or not to invalidate the mortgages and the assignment, or to sustain and uphold their attachments.

While there is nothing to show that any real or actual fraud intervened, yet it is the opinion of this court, from the findings and the evidence, that the mortgages and the deed of assignment were executed at substantially the same time, and as parts of substantially the same transaction. They were all drawn up the same day, to wit: November 28, 1886; were all dated the same day, to wit: November 29, 1886, and were all executed in pursuance of a single determination formed by Townley to execute them; and this determination was not entertained by him until the day on which they were drawn up to be executed; and, therefore, under the following decisions, both the mortgages and the attachment must be held to be absolutely and entirely void, and the assignment to be absolutely and entirely good and valid; and the assignment must be held in law to take all the property in dispute as well as all the other property attempted to be mortgaged or assigned, and leaving nothing for either the mortgages or the writs of attachment to operate upon. The writs of attachment were themselves valid on their face, but did not run against Adams, the assignee, nor against Mrs. Townley, or Charles P. Kellogg & Co., the mortgagees, but did run against Townley, the person who had formerly owned the property. The decisions above referred to, with reference to assignments, mortgages, and attachments, are the following: *Wyeth Hardware Co. v. Standard Implement Co.*, 47 Kan. 423; *Watkins Nat. Bank v. Sands*, 47 Kan. 591; *Douglas Co. Nat. Bank v. Sands*, 47 Kan. ²⁷⁸ 596; *Brigham v. Jones*, 48 Kan. 162, decided June 11, 1892, upon a rehearing. There are some distinctions which might be observed between this case and those above cited, but it is not thought by this court that they require comment.

It is claimed by the defendants in error, plaintiffs below, that the mortgage given to Charles P. Kellogg & Co. was not given by Townley of his own volition and unsolicited, as were the mortgages mentioned in the cases above cited, but were given because of importunities, demands, and active vigilance on the part of Charles P. Kellogg & Co., through their agents, in attempting to collect their claim or to obtain se-

curity thereon, and because of a promise on the part of Townley, the debtor, made several days before the execution of the mortgage, and before the assignment was contemplated, to give security upon the claim if trouble should arise. These things are not thought by this court to be material, however, for the reason, among others, that no intention was really formed by Townley to execute any mortgage to Charles P. Kellogg & Co. until the intention was also formed by him to execute a general deed of assignment for the benefit of all his creditors. When the mortgage was executed, it was not the carrying out of an agreement previously entered into between the parties, upon a new and sufficient consideration passing at the time when the agreement was made, and an agreement intended to be fulfilled by one of the parties in executing a mortgage to the other, but it was simply the carrying out of an intention formed at the very time that another intention was also formed, to execute a general deed of assignment. It does not appear that anything was said prior to this time with regard to mortgages, or that any new consideration passed for the mortgages; hence, as before stated, the mortgages must be considered as void. If the mortgages were valid, of course the plaintiffs would be entitled to recover in this action; but, considering them as void, then what are the plaintiffs' rights? With the views that we have already expressed that the deed of assignment is the only valid instrument or thing upon which the property in dispute could be lawfully taken or held, ²⁷⁹ and that it is wholly valid, and that under it all the property attempted to be assigned or mortgaged or afterwards attached should be held, and that the mortgages and the attachments are all absolutely and utterly void and can legally take nothing nor affect any rights, it would seem that the same result would follow, for the rights of Kellogg & Co. would still be prior, superior, and paramount to those of Jones and his deputy.

Kellogg & Co., at and prior to the time when Jones and his deputy seized the goods and took them from the possession of the plaintiff below, had the exclusive possession thereof, with a claim of absolute right thereto, and with the consent of the only person in the world, the assignee, who had any lawful right to the possession thereof, and who surrendered it to them to secure the payment of just debts, while Jones and his deputy at that time, in seizing the property and taking it away from the possession of the plaintiffs, were mere intruders,

wrongdoers, and trespassers. Kellogg & Co's possession, with their claim of right, was good as against the claims of all the world, except those of the assignee, Adams, and no one else had any right to disturb their possession. Indeed, prior possession with a claim of right is title. In the case of *Hubbard v. Lyman*, 8 Allen, 520, which was an action in the nature of trover for the conversion of tobacco, the following was decided:

"An attachment upon a writ against an insolvent debtor, of property which belonged to him before his insolvency, will render the attaching creditors and others who take the property under the attachment liable, as for a conversion, to one who was in possession of it at the time of the attachment under a claim of title."

Judge Hoar, in delivering the opinion of the court in this case, used the following, among other language: "The plaintiff was in possession of the property when it was taken from him by the authority of the defendant; and he held it under a claim of title. He can maintain his action, ²⁸⁰ therefore, unless the defendant can show a better title. The only title set up by the defendant is as a creditor of William Brown, under an attachment of the tobacco as Brown's property. But it is very clear that the property was not Brown's at the time of the attachment, because all his right in it had passed by the assignment in insolvency to his assignee. If the plaintiff's possession was not lawful the assignee in insolvency was the only party entitled to call him to account. These considerations are decisive of the case."

The case of *Krewson v. Purdom* was an action in the nature of trover for the conversion of certain wood. The case was taken to and decided by the supreme court of Oregon three different times: 11 Or. 266; 18 Or. 563; 15 Or. 589. It appears that in that case, Krewson, the plaintiff, did not by any competent evidence show any better title in himself than mere actual possession with a claim to ownership. The property in fact, it would seem, belonged to Gotardi & Co. The defendants, Purdom and Slocum, were the sheriff and deputy sheriff of the county, and they levied a writ of attachment upon the property as the property of Maria & Co., but they were unable to show that the property belonged to Maria & Co. It was finally and in the last decision held that the plaintiff's possession was sufficient to enable him to maintain the action as against any mere intruder for converting it, and that the defendants were mere intruders; and the

judgment, which had previously been rendered in the lower court in favor of the plaintiff and against the defendants, for the value of the property, was sustained and affirmed: See also, the following cases: *Pomeroy v. Smith*, 17 Pick. 85; *O'Brien v. Hilburn*, 22 Tex. 616; *Lowremore v. Berry*, 19 Ala. 130; 54 Am. Dec. 188; *Bliss v. Winslow*, 80 Me. 274; 6 Am. St. Rep. 195; *Schley v. Lyon*, 6 Ga. 530; and the decision hereafter cited and referred to.

This present action is in the nature of trespass *de bonis asportatis* and of trover, and authorities with respect to either of these actions may be applicable to this. Mr. Lawson, in ²⁸¹ his work on Rights, Remedies, and Practice, volume 7, section 3664, uses the following language: "Possession alone is sufficient to enable one to bring trover; the defendant cannot defend by showing that the title to the chattels is in a third person."

Many authorities are cited in support of this proposition. Mr. Freeman, in his note to the case of *Harker v. Dement*, 9 Gill, 7, 52 Am. Dec. 678, uses the following language: "One entitled to the present possession of chattels may recover in trover against a mere stranger or wrongdoer the full value thereof, with interest from the time of conversion; but against the general owner, or those claiming under him, such plaintiff can recover only the value of his interest, and if the value of his interest equal or exceed the value of the chattel converted, then to the extent of the value of such chattel only."

Mr. Wait, in his work on Actions and Defenses, volume 6, page 216, uses the following language: "It is said in some of the cases, and laid down as a rule in some of the text-books, that a person must have a general or a special property in the property sought to be recovered for, but this can hardly be admitted. It is true that a general or a special owner may maintain the action when they are entitled to the possession of the property instantaner, but it is also true that a person having no property interest therein may, in certain cases, maintain the action also. Mere naked possession, as against one holding no better title, is sufficient, if the property is wrongfully taken out of his possession: *Cook v. Patterson*, 35 Ala. 102; *Knapp v. Winchester*, 11 Vt. 351; *Carter v. Bennett*, 4 Fla. 283; *Coffin v. Anderson*, 4 Blackf. 395; and even a person who has acquired possession of the goods by a trespass may maintain the action against one who has taken from his possession without a better right: Page 216. . . . Mere

naked possession, however acquired, is good as against a person having no right to the possession: Page 218. . . . According to the weight of authority in this country the defendant in trover cannot set up the title of a third person in defense, unless he in some manner connects himself therewith: Page 221. . . . In an action against a stranger he is entitled to recover the value of the property ²⁸² converted, and holds the balance beyond his own interest for the benefit of the general owner: *Ullman v. Barnard*, 7 Gray, 554; and such is the rule in all cases where the plaintiff is liable over to a third party, and the same is true in all cases where the defendant is not entitled to the balance of the value": Page 223.

In *Cooley on Torts*, 444, it is stated: "It has often been decided that possession alone is sufficient to enable one to maintain the action of trover, and in a leading case, always since recognized as authority, the finder of a jewel was held entitled to bring trover against one who, having taken the jewel for examination, refused to restore it. . . . In this respect I see no difference between trespass and trover; for in truth the presumption of law is that the person who has possession has the property. Can that presumption be rebutted by evidence that the property was in a third person, when offered as a defense by one who admits that he himself had no title, and was a wrongdoer when he converted the goods? I am of the opinion that this cannot be done": *Jefferies v. Great Western Ry. Co.*, 5 El. & B. 802.

In *Weymouth v. Chicago etc. Ry. Co.*, 17 Wis. 550, 84 Am. Dec. 763, it is held: "In trover by the party from whose possession property was taken the defendant cannot defeat a recovery by showing title in a third person without connecting himself with that title."

In *Harker v. Dement*, 9 Gill, 7, 52 Am. Dec. 678, the court, in delivering the opinion, say: "The defendant, having failed to connect himself with the estate of Richard Dement, occupied the position of mere tortfeasor who had invaded the possession of the plaintiff without authority; and under such circumstances it is very clear that he could not be permitted to prove that the title to the property in dispute was not in the plaintiff, but was at the time of the conversion outstanding in a third party, with whom he had no connection or privity, to defeat the action, or in mitigation of damages. . . . But in an action against a stranger and wrongdoer who has been guilty of an asportation or conversion of the property,

the plaintiff is treated as the absolute and unqualified owner of the property, and he is entitled to recover its full value."

²⁸³ In *Knapp v. Winchester*, 11 Vt. 351, it is remarked: "In the action of trover possession, whether rightfully or wrongfully obtained, is a sufficient title in the plaintiff as against a mere stranger."

In *Carter v. Bennett*, 4 Fla. 284-355, it is observed: "It is surely not necessary to quote authority to prove that, in trover, possession, whether rightfully or wrongfully obtained, is sufficient title in the plaintiff as against a mere stranger."

In *Duncan v. Spear*, 11 Wend. 54, it is said that, "Trover may be maintained against a stranger upon mere prior possession, obtained by a purchaser of chattels under a void execution. A defendant in trover cannot set up property in a third person without showing some claim, title, or interest in himself derived from such person."

In *Burke v. Savage*, 13 Allen, 408, it is decided that, "Possession of personal property under claim of title is sufficient to entitle the possessor to maintain an action for its conversion against anybody who does not show a better title."

In *Harrington v. King*, 121 Mass. 269, the court, in the opinion, used this language: "It is a leading principle, that bare possession constitutes sufficient title to enable the party enjoying it to obtain a legal remedy against a wrongdoer. . . . It is settled that a bailee who is responsible over to the owner is entitled to recover the full value of the goods, and that such recovery will be a good bar to an action by the latter."

In *Taber v. Lawrence*, 134 Mass. 94, the action was for the conversion of goods sold by one Pratt to plaintiff. Pratt, before the sale, had made an assignment of his property for the benefit of his creditors. The defendants attached the goods as the property of Pratt. A portion of the goods belonged to Pratt before he made his assignment. Morton, C. J., in delivering the opinion, referring to these goods, says:

"But we are also of the opinion that the ruling was erroneous so far as it related to property which belonged to Pratt ²⁸⁴ before the insolvency. In trover, possession of the goods, under a claim of title, is sufficient evidence of property as against one who shows no better right: 2 Greenleaf on Evidence, 637; *Burke v. Savage*, 13 Allen, 408. The only title set up by the defendants is under an attachment of the goods as the property of Pratt. If his assignees are entitled to it under the assignment, the attachment is invalid, and they

are the only parties who have the right to call the plaintiff to account: *Hubbard v. Lyman*, 8 Allen, 520; *Pomroy v. Lyman*, 10 Allen, 468. The defendants show no title to the property, but are mere strangers and trespassers. As against them, the possession of the plaintiff under a claim of right is sufficient evidence of title in him to enable him to maintain this action."

See, also, the following authorities: 1 Sutherland on Damages, 210; 3 Sutherland on Damages, 524; *Burke v. Savage*, 13 Allen, 408; *Vining v. Baker*, 53 Me. 544; *Haslem v. Lockwood*, 37 Conn. 500; 9 Am. Rep. 350; *Bartlett v. Hoyt*, 29 N. H. 317; *Ward v. Carson River Wood Co.*, 13 Nev. 44; *Gilson v. Wood*, 20 Ill. 37; *Brown v. Ware*, 25 Me. 411; *Edwards v. Frank*, 40 Mich. 616; *Omaha etc. Co. v. Tabor*, 13 Col. 41; 16 Am. St. Rep. 185. Title to personal property can generally be proved only by proof of possession, for, as a general rule, no records of writing or personal property titles are kept. Title in such cases is usually established by showing who had the original or the prior possession, and then by showing all the changes of possession or transfers from the party holding the original or the prior possession down to the time in question; and prior possession, if no better right is shown in favor of the adverse party, will always prevail. Possession is not only evidence of title, but, as against any person having no better right, it is title itself: 20 Vin. Abr. 278. "The general rule is, that possession constitutes a sufficient title against every person not having a better title": Broom's Legal Maxims, 638. "Possession is a right of property against all the world but the owner": Cobbey on Replevin, section 136, and cases there cited. This is true even with respect to real estate: *Mooney v. Olsen*, 21 Kan. 691, 697. We decide this case upon the theory of the defendants in error, plaintiffs below, that prior peaceable possession with ²⁸⁵ a claim of ownership or right is good as against all the world except the real owner or one holding or claiming under him.

In this case Kellogg & Co. had, as before stated, the actual, quiet, peaceable, and exclusive possession of the property with a claim of right thereto, and with the consent of all persons who had any right to interfere with the same. They claimed under chattel mortgages which in terms gave to them the absolute right to the possession of the property, and in this state, as well as at common law, the mortgagee of personal property with a right to the possession thereof holds the legal

title. The amounts of Kellogg & Co's claims and of the mortgage debt were greater in this case than the value of the property in controversy; and the judgment rendered by the court below was for a less amount than their claim. As the defendants below, Kellogg & Co., had the absolute right to the property, and such defendants had no right thereto; therefore the defendants below are now responsible to Kellogg & Co. for it; while they (Kellogg & Co.) are responsible to Adams, the assignee, for the same, and in the settlement of the estate they must account to him. After the defendants seized the property and took it from the possession of Kellogg & Co., they might have connected themselves with Adams, the assignee, who held the prior right to the property, by turning it over to him or holding it subject to his orders; and this might have been pleaded and proved on the trial in mitigation of damages or to reduce the damages to a mere nominal sum; but nothing of this kind was done. The defendants seized the property in hostility to the rights of all the parties, not only to those of Kellogg & Co., but also to those of the assignee, and they are responsible to Kellogg & Co., and they (Kellogg & Co.) are in turn responsible to Adams, the assignee. We think that, as Kellogg & Co. received the goods in dispute from Adams, the assignee, with his consent, and held peaceable possession thereof, that the recovery by them against Jones will be a bar to another action by the assignee against him. If Adams, the assignee, has failed to discharge his duty, or has improperly ²⁸⁶ executed his trust by turning over to Kellogg & Co. any property of the insolvent debtor, he is liable upon his official bond: 3 Sutherland on Damages, 474; Schouler on Bailments, 2d ed., 54; Story on Bailments, 94; *Luse v. Jones*, 39 N. J. L. 707; *Harrington v. King*, 121 Mass. 269.

The petition of Kellogg & Co., among other things, contains the following allegations: "And from the time of taking possession of said property, as aforesaid, they, Kellogg & Co., were and remained in the actual and exclusive possession of the same, up to and until the time the goods, chattels, and property hereinafter mentioned and described were unlawfully taken from them by the said defendants, as hereinafter set forth; that afterwards, and on or about the fifteenth day of January, 1887, the said defendants wrongfully, forcibly, and unlawfully seized, took, and carried away the goods, chattels and property mentioned and described in the schedule hereto

annexed, marked 'Exhibit A,' and made a part hereof, the same being a part and portion of the goods, chattels, and property hereinbefore described, and conveyed and mortgaged to said plaintiffs as hereinbefore alleged, and wrongfully and unlawfully converted and disposed of the same to their own use, and wholly deprived said plaintiffs of the use, possession, and enjoyment of the same. The value of said goods and property so as aforesaid wrongfully taken and converted to their own use by the said defendants, and described in said schedule marked 'Exhibit A,' was, at the time the same were so taken, of the value of seven thousand dollars."

A consideration of all the authorities, with the exception of those cited from North Carolina, compels the conclusion, that upon the allegations of the petition referred to, and the findings of fact of the trial court, the theory of the defendants below, that they had a better right to the goods seized, cannot be sustained.

The judgment of the district court will be affirmed.

All the justices concurring.

PRACTICE ON APPEAL—DEFECTIVE RECORD.—When the record on appeal is defective, the remedy is by *certiorari* or by stipulation correcting the error, the mere filing of certified copies of omitted instructions will not remedy the irregularity of failing to set them out in the record: *Beck v. Dowell*, 111 Mo. 506; 33 Am. St. Rep. 547. An alleged impropriety in an attorney's remarks in his argument to the jury will not be considered as a ground for error when presented by affidavit merely and not as a part of the record: *Smith v. Wilson*, 36 Minn. 334; 1 Am. St. Rep. 669. See the extended note to *Rew v. Barker*, 14 Am. Dec. 516, where the question of supplying defects in records on appeal is considered.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—WHEN AVOIDED BY PREFERENCES.—Under the Missouri statute a preference of any creditor in a voluntary assignment for the benefit of creditors renders the assignment void: *Larrabee v. Franklin Park*, 114 Mo. 592; 35 Am. St. Rep. 774, and note. A preference of a creditor by a failing debtor, who soon afterwards makes an assignment of his property for the benefit of his creditors generally, is not fraudulent unless it appears that the debtor's intention to make such assignment was known to the creditor and that the transaction by which the preference was obtained was separated from the assignment for the purpose of obviating the annulment, which would follow if it were contemporaneous with or included in the assignment itself: *Benham v. Ham*, 5 Wash. 128; 34 Am. St. Rep. 851, and extended note at page 856, discussing lawful and unlawful preferences in assignments for the benefit of creditors.

WILLARD v. OSTRANDER.

[51 KANSAS, 481.]

RES JUDICATA—EFFECT OF APPEAL.—The only effect of an appeal from a judgment, supplemented with the filing of a proper *supersedeas* bond, is to stay execution of the judgment, but as long as the case remains unreversed, its conclusiveness as *res judicata* as between the parties is not affected by the appeal.

JUDGMENTS—APPEAL FROM—EFFECT OF AND PRACTICE ON.—The only effect of an appeal supplemented with a *supersedeas* bond is to stay the execution of the judgment appealed from, but trial courts in other subsequent actions have the power to prevent injustice being done in the use of an alleged erroneous judgment as evidence or as an estoppel to continue the hearing of such actions from time to time, until proceedings pending to reverse such judgment are disposed of. The supreme court also has the inherent power for the protection of its own jurisdiction, and for the enforcement of its orders and judgments, to prohibit and restrain upon proper terms, the parties in any proceeding pending in that court, from using a judgment brought there for review, as evidence or as an estoppel in any other case pending in that or any other court, so long as the proceeding to review the alleged erroneous judgment remains undetermined.

CONVERSION—WANT OF EVIDENCE TO SUPPORT INSTRUCTION.—If in an action charging the defendant with the unlawful taking and converting of a flock of sheep, he justifies under a chattel mortgage given by plaintiff to him which mortgage the plaintiff charges the defendant with having materially altered after its execution, it is error for the court to submit as a material question the issue as to the alteration of such mortgage when no evidence tending to show such alteration by the defendant or his agent has been introduced.

CHATTEL MORTGAGE ON SHEEP INCLUDES THEIR WOOL as between the parties, but after such wool is clipped and sold to a purchaser for value without notice he gets a good title free from the lien of the mortgage.

CHATTEL MORTGAGE—MATERIAL ALTERATION—PRESUMPTION.—The insertion of the word "wool" in a chattel mortgage of sheep subsequently to its execution is a material alteration, but it will not be presumed that the mortgagee made such alteration or directed his agent having the possession of the mortgage to so alter it.

Bailey and Foley, and J. W. Mills, for the plaintiff in error.

J. E. Hessin, Sam Jones, and A. M. Lasley, for the defendant in error.

485 ALLEN, J. This action was brought by the defendant in error, as plaintiff below, to recover the value of one thousand five hundred Merino sheep which he alleges he owned, and the defendant took and converted to his own use. The defendant admitted the taking of the sheep, but justified the act as having been done by virtue of a chattel mortgage given by the plaintiff to him on the second day of September, 1885,

on the sheep in controversy, to secure the sum of three thousand eight hundred and fifty dollars and fifty cents, according to the terms of four promissory notes. To this answer the plaintiff replied, denying the execution of the mortgage as set out in defendant's ⁴⁸⁶ answer, but admitting that he executed a chattel mortgage on the same sheep, and alleging that a material change had been made therein by the defendant, without the consent of the plaintiff, by inserting the word "wool"; also alleging that the sheep mortgaged were purchased from the defendant, and the mortgage given to secure the purchase price; that said sheep were warranted to be sound and healthy and free from disease; that they were in fact diseased, having a contagious disease commonly known as "mange," "scab," or "itch"; that various damages had been sustained by the plaintiff by reason of such disease; that the consideration of such notes had failed. The reply also alleged that an action was then pending in the district court of Trego county between the same parties on one of said notes which has been sued on by the defendant in this case in that county, and that the matters in controversy in this action were also in controversy in that.

This action was commenced on March 15, 1888. On December 18th of that year the plaintiff filed a supplemental reply, alleging that, after the filing of his former reply, the Trego county case had been determined by a verdict of a jury and judgment thereon in favor of Ostrander against Willard for two thousand one hundred and ninety-one dollars and sixty-six cents, less the amount of said note, and claiming such former adjudication as a bar to defendant's claim under the chattel mortgage.

The assignments of error are multitudinous. Two principal questions, however, are discussed in the briefs and on the oral argument of the case, which we will proceed to consider. On the trial, copies of the pleadings and judgment in the Trego county case were received in evidence. The defendant offered in evidence a *supersedeas* bond filed in that case, and offered to show that an appeal had been taken in that case to this court, and was here pending undetermined. The court refused to receive the bond in evidence, and held that the judgment was in full force as an adjudication of the rights of the parties therein determined, notwithstanding the proceedings in error in this court and the filing of a *supersedeas* bond. One of the important questions we are called on to ⁴⁸⁷ decide

is as to the correctness of this ruling. The effect of appeals and proceedings in error, where the execution of the judgment is stayed upon the judgment as evidence in another action between the same parties, has been frequently considered by the courts, and the decisions are by no means harmonious. In Freeman on Judgments, section 328, the author says:

"When an appeal is taken from a judgment it is evident that the appellant cannot have the full benefit of his appeal if, during the time necessary to procure a decision in his appellate court, the judgment may be used against him to the same extent as if no appeal had been taken. The mere issuing and enforcement of the execution may be stayed by the giving of an appropriate bond, but there is no provision in the statutes whereby the force of a judgment as evidence, or as an estoppel, may be avoided by the giving of any bond or other security. In perhaps a majority of the states the perfecting of an appeal suspends the operation of a judgment as an estoppel, and renders it no longer admissible as evidence in any controversy between the parties. The chief objection to this line of decisions is, that it enables one against whom a judgment is entered to avoid its force for a considerable period of time merely by taking an appeal. During that time he may carry on other controversies with the same parties, involving the same issues, and obtain decisions contrary to that from which the appeal was taken, and which could not have been obtained had the former judgment been admissible as evidence against him; and when it is finally determined that such judgment was free from error, there may be no mode of retrieving the loss resulting from its suspension by the appeal. Probably, this consideration has been the most potent in procuring the numerous decisions maintaining that the effect of an appeal, with proper bond to stay proceedings, is merely that it suspends the right to execution, but leaves the judgment, until annulled or reversed, binding upon the parties as to every question directly decided. The evil resulting from this rule is, that though the judgment is erroneous, and for that reason is reversed, yet before the reversal it may be used as evidence, and thereby lead to another judgment, which cannot in turn be reversed, because the action of the trial court in receiving and giving effect to the ⁴⁸⁸ former judgment was correct, and does not become erroneous when such judgment is subsequently reversed."

This case strongly illustrates the hardships in the case last

mentioned by the author, as the judgment in the Trego county case was reversed by this court: *Willard v. Ostrander*, 46 Kan. 591. Yet if it was rightfully admitted in evidence, and if the proceedings in error did not stay its force as an estoppel, it affords no ground for a reversal of the judgment in this case. Viewed from either side, the question is not without difficulty. Numerous authorities maintain the doctrine that the whole effect of the judgment is stayed. See *Burton v. Burton*, 28 Ind. 342; *Paine v. Schenectady Ins. Co.*, 11 R. I. 411; *Cloud v. Wiley*, 29 Ark. 80; *Sage v. Harpending*, 49 Barb. 166; *Souter v. Baymore*, 7 Pa. St. 415; 47 Am. Dec. 518; *State v. McIntire*, 1 Jones, 1; 59 Am. Dec. 566; *Sharon v. Hill*, 26 Fed. Rep. 337; *De Camp v. Miller*, 44 N. J. L. 617; *Atkins v. Wyman*, 45 Me. 399; *Day v. De Jonge*, 66 Mich. 550. In order to understand the force of each of the cases bearing on this question, it is necessary to know the statutory provisions of the states where rendered, as to the effect of appeals and proceedings in error. It is also necessary to discriminate between appeals at law and in equity under the old chancery practice, where, generally speaking, the trial was *de novo* and final judgment rendered, or directed by the appellate court. Most of the above cases appear to be either suits in equity or appeals taken under some statute which provides that the taking of an appeal shall have the effect to vacate the judgment, or that the trial in the appellate court shall be *de novo*.

On the other side of the question are the following cases: *Nill v. Comparet*, 16 Ind. 107; 79 Am. Dec. 411; *Scheible v. Stagle*, 89 Ind. 328; *Padgett v. State*, 93 Ind. 397; *Faber v. Hovey*, 117 Mass. 107; 19 Am. Rep. 398; *Thompson v. Griffin*, 69 Tex. 139; *Moore v. Williams*, 182 Ill. 589; 22 Am. St. Rep. 563. In the latter case the third paragraph of the syllabus reads as follows: "An appeal from a decree does not destroy its operation as a former adjudication. It does not vacate the decree, but simply suspends its execution. ⁴⁹⁹ It leaves the decree in full force as a merger of the cause of action and a bar to further litigation." In *Parkhurst v. Berdell*, 110 N. Y. 386, 6 Am. St. Rep. 384, it was held, that a reversal of a judgment after it has been received as evidence in another action cannot bear retrospectively so as to render its reception erroneous. The fact of "reversal cannot appear by the record in the second action, and the only remedy of the injured party, if any he have, is by motion for a new trial." See, also, *Bank of North America v. Wheeler*, 28 Conn. 433; 73 Am. Dec. 683;

Planters' Bank v. Calvit, 3 Smedes & M. 143; 41 Am. Dec. 616. While the attention of this court has never been directed to the precise question we are now considering, the conclusive force of a former adjudication has often been recognized, and in some of the cases language has been used broad enough to cover the question in this: See *Norton v. Graham*, 7 Kan. 166; *Challiss v. City of Atchison*, 45 Kan. 22; *Chicago etc. R. R. Co. v. Commissioners of Anderson Co.*, 47 Kan. 766; *Bank of Santa Fe v. Haskell County Bank*, 51 Kan. 50.

It is provided by statute that, on an appeal from a judgment of a justice of the peace, a trial *de novo* shall be had in the district court. There is no question in such a case that the filing of the appeal bond has the effect to vacate the judgment; but where proceedings in error are prosecuted in this court there is no provision in the statute authorizing a vacation of the judgment pending the proceedings here. The language of the code is, that "execution on the judgment may be stayed." A proceeding in error does not have even this effect unless a proper bond is filed. The statute provides that this court may reverse, vacate, or modify a judgment of the district court, for errors appearing on the record. We are unable to find any language used by the legislature which seems to us to imply that a stay of execution has any other force or effect on the judgment than simply to prevent its enforcement by execution. On the contrary, as a determination of the rights of the parties, it remains in full force pending the proceedings here. It is apparent that this construction of the law may work great hardship in some cases. The trial ⁴⁹⁰ courts, however, have ample power, when it is apparent that injustice may be done, to grant continuances until a case pending in this court, sought to be used as a bar or estoppel, is determined; and it would seem to us, where an appeal to this court has been taken in good faith, and a sufficient bond to stay execution has been given, that if the introduction of a judgment in another case would have the effect, as in the case now before us, to permit the party holding the judgment, through the medium of another action, to collect that judgment, that the trial court should always, on the proper showing being made, continue the trial until after the case pending here is determined. Only in this way can full justice be done.

It was claimed by the plaintiff that the chattel mortgage given by him to the defendant was altered by the defendant, after its execution and delivery, in a material part, viz: by

inserting the word "wool" therein; that by reason of such alteration the mortgage was avoided. The court in its charge to the jury included the following:

"The plaintiff claims that the mortgage was materially changed without his consent after he executed it by inserting therein the word 'wool'; and further, that there was nothing due this defendant upon the note sued on in Trego county in the case in which this defendant was plaintiff and this plaintiff was defendant, and that this defendant was not the owner of the note when the sheep were taken, and that for these reasons defendant had no right or authority under the mortgage to take the sheep; and these are material questions for the jury to determine in this case from the evidence introduced upon the trial, and I will instruct you further upon these matters."

"8. The jury are instructed that the validity of the mortgage when the sheep were taken by the defendant depends upon these two propositions: 1. Did the defendant execute the mortgage? 2. Did any of the debt secured by the mortgage remain unpaid, or unsatisfied, or unextinguished? If the word 'wool' was inserted in the mortgage after it was executed by the plaintiff, and without his consent, it was a material change and alteration, and if it was so made by the defendant, or by his direction or authority, it would render ^{the} the mortgage void and of no effect; but if the word 'wool' was in the mortgage when it was executed by the plaintiff, or if he consented to its insertion therein at any time thereafter, or if it was inserted therein by any person besides the defendant, but without the direction or authority of the defendant, then the mortgage would not be void, but would be good, although, if the plaintiff did not execute it with the word 'wool' in it, and did not give his consent to insert the word 'wool' in it, it would not be a good mortgage on the 'wool' after it had been clipped from the sheep."

From these instructions it will be seen that the jury were told by the court that, under the evidence, it was an open question whether the mortgage had been materially altered by the defendant or not. The only testimony which could possibly be construed as proof of the alteration of the mortgage by the defendant was a statement by the plaintiff as follows: "I signed the chattel mortgage, but it was altered afterward." No statement whatever was made by the plaintiff as to who made the alteration, or when it was made; but

it is claimed by the plaintiff that the question was determined in his favor in the Trego county case. There appears in the record this statement, occurring after the offer by the defendant to read in evidence a portion of the deposition of Charles Weeks:

"Plaintiff wishes to state, and have it introduced in the record, that we don't ask them to litigate that question, and don't propose to offer any evidence on the question, any oral evidence on the question as to the execution of this mortgage with 'wool' inserted therein, for the reason it has been litigated between this plaintiff and defendant in this action in the district court of Trego county, Kansas, wherein Frank G. Willard was plaintiff and John M. Ostrander was defendant, and the same was found in favor of the defendant."

A certified copy of the record in that case was read in evidence. The answer of the defendant, it is true, alleged that a chattel mortgage had been executed by the defendant to the plaintiff to secure the note sued on in that action and others, and that said chattel mortgage was altered in a material part by the plaintiff or his agent, as follows, to wit, the words ~~and~~ "and wool" were interlined between the words "their" and "increase"; and in conclusion the defendant in that case prayed that the plaintiff be ordered to bring each of said notes of nine hundred and fifty dollars each into court for cancellation; second, that said chattel mortgage be declared fraudulent and void; and then followed prayers for damages. The jury rendered a verdict in favor of the defendant assessing his damages at two thousand one hundred and ninety-one dollars and sixty-six cents. No finding whatever was made, either by the court or jury, as to the alteration or validity of said mortgage; but the court rendered judgment as follows:

"It is therefore considered, ordered, and adjudged by the court that said defendant have and recover from the plaintiff herein the sum of two thousand one hundred and ninety-one dollars and sixty-six cents as his damages, also costs of suit, less one thousand three hundred and eighteen dollars and eighty-six cents, being the amount of the note and interest herein sued on."

There being no finding or judgment of the court upon the question of the alteration of the mortgage, and as the judgment was in no manner based on the mortgage, and no order whatever with reference to the security of the plaintiff there-

under was made by the court, we fail to see how the judgment in that action affords any evidence whatever in this, on the question of alteration of the mortgage. The evidence in this case shows that the defendant himself was not in possession of the mortgage until a long time after the word "wool" appeared therein, and the defendant's agent, Weeks, and his son, both swore positively that the word "wool" was inserted in the mortgage before its execution and delivery by Ostrander. There being no testimony to go before the jury on that point the instructions were erroneous and misleading, if material.

It will be observed that the trial court treated this question not only as material, but as important. Was it really so? Willard justified the taking of the sheep under this mortgage, claiming that the balance of two thousand three hundred dollars secured thereby was still due him on two of the notes. The jury was instructed by the court that if anything was due the defendant on either of the notes he had a right to take possession of the sheep. It was claimed by the plaintiff, Ostrander, that the note not sued on ⁴⁰³ in Trego county had been sold by Willard to Ann C. Ostrander, and was not his property. Testimony was offered for the purpose of establishing that claim, and the jury were instructed in reference thereto. The thirteenth instruction is as follows:

"The jury are instructed that if it appears from the copy of the judgment rendered in Trego county, in the suit brought by this defendant against this plaintiff upon one of the notes in question, that the judgment was against this defendant for a sum over and above the amount of the note sued on, that judgment cuts no figure with reference to the other note that was not sued on in that action; and if this defendant was the owner of the other note when he took the sheep, and if the mortgage was valid upon the sheep taken, or any of them taken, and if such other note had not been paid or satisfied, or extinguished in any way, before the sheep were taken by the defendant, and if the defendant took the sheep under said mortgage, such taking would not be wrongful as to such sheep as were covered by the mortgage, if this other note was not canceled, paid, satisfied, or the debt evidenced thereby extinguished by reason of that judgment, whatever effect it might have had upon the other note."

The record shows that the jury returned into court with the following verdict: "We, the jury impaneled and sworn in

the above-entitled case, do, upon our oaths, find for the plaintiff in the sum of two thousand eight hundred dollars, less the Ann C. Ostrander note, with interest thereon." This verdict the court refused to accept, and sent the jury out again. They then returned a second verdict, as follows: "We, the jury impaneled and sworn in the above-entitled cause, do, upon our oaths, find for the plaintiff in the sum of seventeen hundred and ninety dollars and sixty cents." There really seems to have been no substantial conflict as to defendant's ownership of both notes, and the jury by their first verdict found in effect that Willard owned the Ann C. Ostrander note. If so, under the instructions of the court, the jury should have found for the defendant, unless they found that the mortgage had been altered in a material part by the defendant ⁴⁹⁴ or under his direction, after its execution. If the jury were guided in their deliberations by the instructions of the court, as it was their duty to be, they then must have found that the mortgage was in fact so altered, and this finding is wholly unsupported and contradicted by the evidence.

Much is said in the briefs, and the point was vigorously pressed on the oral arguments, as to the materiality of the word "wool" in the mortgage. Plaintiff in error contends that a mortgage of the sheep necessarily covers their wool. The question is not free from difficulty: See *Jones' Chattel Mortgages*, secs. 149-151, and cases therein cited: *Bryant v. Pennell*, 61 Me. 108; 14 Am. Rep. 550. Without attempting to carefully review all the authorities, we think, as between the parties to the action, a mortgage on the sheep would include the "wool," but that, after the "wool" was clipped, if sold to a purchaser for value without notice, he would get a title free from the lien of the mortgage. If this conclusion be correct, the insertion of the word "wool" would be a material alteration. If the mortgage was in fact altered after its execution, the alteration must have been made by the mortgagee, or by his direction, to impair its validity; and it will not be presumed that an agent intrusted with the possession of the security was directed by the mortgagee to make such an alteration, but that fact must be shown by proof: *Langenberger v. Kroeger*, 48 Cal. 147; 17 Am. Rep. 418. Some other questions are urged on our consideration, but as they are not likely to arise on another trial, we do not feel called on to specially mention them.

For the errors of the court in instructing the jury, the judgment must be reversed, and a new trial ordered.

HORTON, C J., concurring: While proceedings in error, supplemented with a *supersedeas* bond, only "stay the execution of the judgment," and while the trial courts in other subsequent actions may, to prevent injustice being done in the use of an alleged erroneous judgment as evidence, or as ⁴⁹⁵ an estoppel, continue from time to time the hearing of such an action until proceedings pending to reverse such a judgment are disposed of, the supreme court also has the inherent power, for the protection of its own jurisdiction, and for the enforcement and protection of its own orders and judgments, to prohibit and restrain, upon proper terms, the parties in any proceeding pending in this court from using a judgment brought here for review as evidence, or as a bar or estoppel, in any other case pending in this or any other court, so long as the proceedings to review the alleged erroneous judgment remain undisposed of: *Chicago etc. R. R. Co. v. Board of Commrs.*, 42 Kan. 223.

JOHNSTON, J., concurring: I concur in what has been said in the principal opinion, and, as an additional authority sustaining the position that the filing of a petition in error and of the ordinary stay bond goes no further than to stay the execution of the judgment, I cite *Central Branch etc. R. R. Co. v. Andrews*, 84 Kan. 563, where it was expressly held that

"The institution of a proceeding in error in the supreme court does not of itself operate to suspend further proceedings in the case in the court below; nor will the giving of the undertaking provided for in sections 551 and 552 of the code suspend proceedings in the district court further than to stay execution of the judgment or final order sought to be reviewed."

I also fully concur with the chief justice, that this court has ample power, when necessary, to stay and suspend the effect and use of the judgment for any purpose during the pendency of a proceeding brought for a reversal of such judgment.

APPEAL PENDING—EFFECT ON JUDGMENT AS ESTOPPEL.—An appeal from a judgment does not suspend its operation as an estoppel: *Moore v. Williams*, 122 Ill. 589; 22 Am. St. Rep. 563, and note; *Parkhurst v. Berdell*, 110 N. Y. 366; 6 Am. St. Rep. 334, and note in which the cases are collected holding that the effect of the appeal together with the proper stay bond merely suspends its execution and in no way interferes with it as an estoppel; also note to *Naftzery v. Gregg*, ante, pp. 29-32.

ALTERATION OF INSTRUMENTS—BURDEN OF PROOF.—If a writing appears to have been altered, but there is nothing to show when or by whom the alteration was made, the party claiming that it was made after delivery and without authority must assume the burden of proof: *Hagan v. Merchants' etc. Ins. Co.*, 81 Iowa, 321; 25 Am. St. Rep. 493, and note; *Harris v. Bank*, 22 Fla. 501; 1 Am. St. Rep. 201, and note. In the absence of evidence to the contrary an alteration in a deed will be presumed to have been made contemporaneously with its execution: *Kendrick v. Latham*, 25 Fla. 819. See the extended note to *Neil v. Case*, 37 Am. Rep. 260-264.

KING v. HYATT.

[61 KANSAS, 504.]

PRACTION—SUPPLEMENTAL PETITION—WAIVER OF NOTICE.—A trial court has power to permit a supplemental petition to be filed on such terms as to costs and notice as it may prescribe. When such petition is permitted to be filed during the trial without previous notice, and the opposing party objects to such filing on grounds other than want of notice, and proceeds with the trial without any application for delay, he cannot subsequently complain of want of notice in the absence of any showing of undue advantage.

CONVEYANCE—EVIDENCE OF IDENTITY.—A statement in a deed by parents and their children conveying land of the estate of a deceased member of the family that a sister of the deceased joining in the conveyance as heir under a surname different from her maiden name is an heir of the deceased, is sufficient proof of her identity as such in the absence of opposing evidence.

EJECTMENT BY COTENANT—MEASURE OF RECOVERY.—The owner of an undivided one-fourth interest in land, who, acting solely for himself, sues in ejectment to recover the whole tract from a party in possession under an adverse title, can recover possession of his own share only if it appears that he and the holder of the remaining three-fourths have no community of interest, and claim under different titles.

Henry Elliston and S. Heath, for the plaintiff in error.

L. F. Bird, for the defendant in error.

507 ALLEN, J. This was an action of ejectment brought by defendant in error, Hyatt, to recover possession of sixteen and a quarter acres of land near Atchison. The plaintiff was adjudged to be the owner of an undivided one-fourth interest in the land, and was given judgment for the possession of the whole tract. Very numerous assignments of error are made and discussed by the plaintiff in error. We shall notice only such as appear to us worthy of mention. Plaintiff in error was in 508 possession of the land under a tax deed dated September 18, 1885, issued to R. L. Pease, and a quitclaim

deed from Pease to him; also a quitclaim deed from George T. Challiss, dated November 20, 1882. Hyatt claimed title derived through a chain of conveyances from the heirs of William C. Nutt, who held the land under patent from the United States. William C. Nutt died leaving four heirs, who conveyed the south half of the southeast quarter of section 35, township 5, range 20, Atchison county, Kansas, in which the tract in controversy is included, to James A. Headley and Joseph P. Carr on the twenty-eighth day of April, 1858, but this deed was void as to the interest of Olivia D. Nutt, who at the time was a minor. The deed purports to have been executed by M. E. Nutt, as her guardian, and he is not shown to have had any authority to convey her interest in the land. A sheriff's deed founded on a void judgment against Headley and Carr, which was afterward set aside by the court, was executed to L. C. Challiss, and plaintiff's title was derived through intermediate conveyances from Challiss. This title, however, was fortified by a quitclaim deed from the heirs of William C. Nutt to Albert G. Smith, dated August 28, 1871. This deed was executed by Harry Lee and Olivia D. Lee, together with the same persons who joined in the first deed as heirs of William C. Nutt, except Olivia D. Nutt, by her guardian, and this later deed designates the grantors as heirs of William C. Nutt. Whatever title was conveyed by this deed passed, through intermediate conveyances, or by reason of the covenants of warranty contained in former deeds, to Hyatt, but the plaintiff is not shown to have acquired the title which passed to Headley and Carr by virtue of the first deed executed by the Nutt heirs. So far as the record shows, three-sixteenths of that title was conveyed by Headley and Carr to Samuel Lord, Jr., and the balance to James Headley.

Plaintiff in error contends that the court erred in permitting record copies of various deeds to be admitted in evidence, for the reason that there is not a sufficient showing that the ^{see} originals were not in plaintiff's possession or under his control. We think, however, there was sufficient testimony to warrant the court in receiving them. We think, also, that records of the probate court, including the affidavit of Smith, were admissible, being records required to be kept by law.

Plaintiff in error criticises at length the descriptions in the various deeds included in the plaintiff's chain of title, and contends that they are void for uncertainty. We think, however, when taken in connection with all the facts shown

in the case, it is clear that they refer to the land in controversy, and are not void. It appears that on the trial plaintiff asked leave of court and was permitted to file a supplemental petition, setting up an after-acquired title. Defendant objected at the time, but made no point of the want of notice of the application. The defendant strenuously contended that it was error for the court to permit this to be done. Section 144 of the code expressly authorizes this procedure, and no claim is made that the issues were so changed by the supplemental petition as to require a continuance. While it is true that, in permitting a supplemental petition to be filed, the court should see that no undue advantage is taken through an unexpected change of the issues in the case, the statute clearly authorizes the filing of such pleadings, on such terms as to costs and on such notice as the court may prescribe. The case of *Smith v. Smith*, 22 Kan. 699, is cited as being in opposition to the ruling of the court in this case. That was an action to obtain a divorce, and it was held that the court did not err in refusing to permit the plaintiff to file a supplemental petition, setting up a cause of action accruing after the commencement of the suit. That case merely holds that the plaintiff could not file such supplemental petition as a matter of right, and that it was within the discretion of the court to refuse his application for leave to file it. In this case the court granted leave, and we think its action in that respect was not erroneous: See *Porter v. Wells*, 6 Kan. 453; *Simpson v. Voss*, 31 Kan. 227; *Williams v. Moorshead*, 33 Kan. 618; *Dreilling v. First Nat. Bank*, 43 Kan. 197; 19 Am. St. Rep. 126. These and ⁵¹⁰ other cases decided by this court hold that the matter of permitting amended and supplemental pleadings to be filed rests largely within the sound discretion of the trial court, and we think there was no abuse of discretion in this case. No application for a delay of the trial was made by the defendant, nor was there any showing of surprise, or undue advantage, being taken.

It is claimed that there is no evidence that Olivia D. Lee, who joined in the deed to A. G. Smith, is the same person as Olivia D. Nutt. The testimony of L. C. Challiss shows that Olivia D. Nutt was unmarried at the time of the death of William C. Nutt, and that she afterwards married, but he does not state the name of her husband. The deed to Smith which was joined in by the parents and sister of Olivia D.

Nutt, gives the name of Olivia D. Lee as one of the heirs of William C. Nutt, deceased, and names four persons as all the heirs of William C. Nutt. We think the declarations of these relatives, contained in the deed, with reference to the fact that Olivia D. Lee was an heir of William C. Nutt, is evidence of that fact, being a declaration by them in a solemn instrument upon a matter of pedigree, and that in the absence of opposing evidence the identity of Olivia D. Lee with Olivia D. Nutt is sufficiently shown: 1 Greenleaf on Evidence, sec. 104.

The tax deed to Pease, not being attested by the seal of Atchison county, is void: *Reed v. Morse*, 51 Kan. 141.

We think, notwithstanding the many objections urged by the plaintiff in error, that the uncontradicted evidence fairly sustains the finding that Hyatt was the owner of an undivided one-fourth of the land in controversy, and that the court was warranted in so instructing the jury. We are unable to perceive any disputed question of fact which they should have been required to pass on.

The record, however, presents a further question, which merits more extended notice, viz: Can the plaintiff, having title only to one-fourth, recover the whole tract, on the theory that such recovery is permitted for the benefit of his cotenants? ⁵¹¹ This is a question on which there is a great diversity and conflict in the authorities. In Sedgwick and Wait on Trial of Title to Land, section 300, it is said:

"Each tenant can pursue his remedies independent of the others, and may maintain ejectment or trespass to try title alone, and in many states may recover the entire premises and estate from trespassers, strangers, wrongdoers, and all persons other than his cotenants and those claiming under them. Where this right is recognized, he recovers for the benefit of all."

This principle is expressly recognized in Oregon, Nebraska, Nevada, North Carolina, Colorado, and California, but this rule has been repudiated in Massachusetts, Pennsylvania, and Missouri. In Freeman on Cotenancy and Partition, section 343, it is said: "A tenant in common is, as against every person but his cotenants, entitled to possession of every part of the common lands. He may, therefore, in most of the states, recover possession of all such lands, in an action of ejectment brought against a stranger to the common title."

In the case of *Hardy v. Johnson*, 1 Wall. 371, it is held:

"By the law of California, one tenant in common of real property can sue in ejectment and recover the demanded premises entire as against all parties except his cotenants, and persons holding under them. But the judgment for the plaintiff in such case will be in subordination to the rights of his cotenants."

The following decisions of the supreme court of that state seem to uphold this decision: *Newman v. Bank of California*, 80 Cal. 368; 13 Am. St. Rep. 169; *Williams v. Sutton*, 43 Cal. 71; *Chapman v. Quinn*, 56 Cal. 266.

In *Barrett v. French*, 1 Conn. 364, 6 Am. Dec. 241, it is said: "Where one tenant in common brings an action of disseisin, and grounds his claim to recover on the common title, he recovers for the benefit of the whole; the possession of one tenant in common recognizing the title of his cotenants is, in legal consideration, the possession of all. Of course, if a tenant in common in such action obtains possession of the land, his cotenants become likewise possessed."

⁵¹³ In *Hibbard v. Foster*, 24 Vt. 542, it was held "that, in an action of trespass *quare clausum fregit*, the plaintiff having title to one-half of the premises might recover the whole damages."

In *Crook v. Vandervoort*, 13 Neb. 505, it is said: "As against a mere disseisor, one tenant in common of undivided real estate may recover the possession of the premises, as his recovery of possession will inure to the benefit of all the cotenants"; citing *Stark v. Barrett*, 15 Cal. 362; *Collier v. Corbett*, 15 Cal. 183; *Touchard v. Crow*, 20 Cal. 150; 81 Am. Dec. 108; *Treat v. Reilly*, 35 Cal. 129; *Chesround v. Cunningham*, 3 Blackf. 82. "In such cases there would be a mere defect of parties plaintiff, which, if not objected to, would not defeat a recovery."

The rule that one tenant in common may recover the whole tract was announced by the supreme court of Texas in numerous cases: *Croft v. Rains*, 10 Tex. 523; *Watrous v. McGrew*, 16 Tex. 510; *Grassmeyer v. Beeson*, 18 Tex. 766; 70 Am. Dec. 309; *Hutchins v. Bacon*, 46 Tex. 414; *Read v. Allen*, 56 Tex. 176; *Sowers v. Peterson*, 59 Tex. 216. But in the case of *Cromwell v. Holliday*, 34 Tex. 463, the court says: "Proceeding upon the authority of *Croft v. Rains*, 10 Tex. 520, *Watrous v. McGrew*, 16 Tex. 506, and *Grassmeyer v. Beeson*, 18 Tex. 753, 70 Am. Dec. 309, claiming to a tenant in common of certain parties whose very existence is doubted, he brings this suit against the defendants below, treating them as

strangers and trespassers, and probably looking to the advantage of recovery he would claim the whole two leagues. To say the least of it, this gives the action on the part of Holliday very much the appearance of a land speculation, although he does not pretend to sue for anybody but himself, and therefore, upon the authority of *Stevens v. Ruggles*, 5 Mason, 221, if he recovers at all, he can only recover for himself the interest of which he is justly entitled, whether by metes or bounds or undivided. This court would not, under the circumstances, in the application of any principle of equity, make him trustee of the title for his cotenants, if satisfied that the title of the defendants below was insufficient to defeat his action."

⁵¹² In the early case of *Dewey v. Brown*, 2 Pick. 387, the supreme court of Massachusetts said: "As to the claim of the demandant for judgment for the whole, it is not supported by any of the authorities which have been cited, and no good reason can be given for such a judgment. The demandant, upon production of her title, shows that she is co-heir with five others; she will therefore have entire justice done to her if she is allowed to recover an undivided sixth part. The tenant, being in possession, ought not to be disturbed, except by those who have the right."

In *Mobley v. Bruner*, 59 Pa. St. 488, 98 Am. Dec. 360, it is said: "The plaintiff in ejectment must recover on the strength of his own title, and his recovery must consequently be in accordance with his title. Tenants in common have several and distinct titles and estates, independent of each other, so as to render the freehold several also. They are separately seised, and there is no privity of estate between them. If tenants in common are separately seised, and there is no privity of estate between them, if they must sue separately or joint, according to the circumstances of the case, the nature and cause of the action, or the character of the injury to be redressed, it follows as a necessary corollary that one tenant in common cannot maintain ejectment or sue and recover in any form of action for the interest and benefit of the others: *Dawson v. Mills*, 82 Pa. St. 302."

In *Gray v. Givens*, 26 Mo. 303, it is said: "It was formerly held that a plaintiff in ejectment could not recover an undivided part when he claimed an entirety, but this strictness no longer prevails; and though a plaintiff may recover less than he claims, it is apprehended that he cannot recover more than he shows title to. But it is said that though this is the gen-

eral rule, there is a difference when the defendant is a stranger to the plaintiff's title, and that as to him one tenant in common, though entitled to only a part, may recover the whole, and when he is put into possession will hold for the other tenants in common as well as for himself. At common law tenants in common could not recover on a joint demise, and 'as the right of possession, which depends on title, is several, a recovery by one will restore him only a moiety of the possession against the disseisor, who will hold the other moiety with him in common.' Our statute ⁵¹⁴ permits tenants in common to join, but there is no use in this if one can recover for the others, and, if this is true, A may recover for B, though B could not recover for himself. It often happens that one tenant in common is barred by limitation when the other is not, and a title may be acquired by adverse possession."

While there is undoubtedly much conflict in the authorities, it is not so great as might appear from the language found in some of the cases. We think the rule quite well established that one tenant in common may maintain an action of trespass against a mere wrongdoer, and recover in his own name the whole damage, and generally that one cotenant may recover for any injury done by a mere trespasser or wrongdoer. Nor are we prepared to assert that cases may not arise in which one cotenant might recover possession of the whole property, in his own name, for the benefit of all: See *Coulson v. Wing*, 42 Kan. 507; 16 Am. St. Rep. 503. But in this case there appears to be no community of interest between Hyatt and the owners of the other three-fourths of the land. Hyatt derived his title through a chain of conveyances from the heirs of William C. Nutt, beginning with a deed to Albert G. Smith, while the other three-fourths interest would appear to be vested in James Headley, who derived his title through a much earlier conveyance, made by those heirs to Headley and Carr, and the validity of Hyatt's title depends wholly on a defect in this conveyance to Headley and Carr, so that in fact there would appear to be as much antagonism between the claim of the plaintiff below and the owner of the other three-fourths interest as between the parties to this action. The case impresses us as quite different from one where, for example, a widow might sue in her own name and seek to recover of the entire estate for the benefit of herself and children; yet as to the necessity of joining all the heirs in

such a case we express no opinion. The code provides "that every action must be prosecuted in the name of the real party in interest," subject to certain exceptions, which do not affect this case. If the plaintiff be allowed to recover in this action ⁵¹⁵ the whole property, he will, on the strength of a title to one-fourth, have recovered possession of three-fourths to which he has no title; and, under the facts in this case, having so obtained possession of the entire property, he will not be estopped from denying the title of the owner of the other three-fourths. In bringing this action, the plaintiff sought to recover the whole property. In his petition he gives no hint of any outstanding title in a cotenant. We think that, under all the facts of the case, as they are claimed by the defendant in error to be, he could recover only the interest he has shown in the land; and the jury having rendered a verdict, under the instructions of the court, that the plaintiff is the owner of the undivided one-fourth part of the land in controversy, the judgment should be so modified as to give the plaintiff below judgment for the recovery of that one-fourth alone.

The plaintiff in error complains of the failure of the trial court to adjudge the payment of the amount of taxes paid under his tax deed before the plaintiff should be let into possession. We do not think this is an error for which the judgment should be reversed, but that the court can still make such orders as the law requires with reference to the tax lien and the value of improvements made by the occupying claimant. The case will be remanded, with directions to modify the judgment in accordance with the views herein expressed.

All the justices concurring.

COTENANCY.—An action may be maintained by one cotenant against the holder of an adverse title or a trespasser to recover the whole property without joining his cotenant: *Johnson v. Schumacher*, 72 Tex. 334; *Wright v. Dunn*, 73 Tex. 293; *Moulton v. McDermott*, 80 Cal. 629; *Thames v. Jones*, 97 N. C. 121; *Lee Chuck v. Quas Wo Chong*, 91 Cal. 593; *Newman v. Bank*, 80 Cal. 368; 13 Am. St. Rep. 169, and note; *Smith v. Tankersley*, 20 Ala. 272; 56 Am. Dec. 193, and note. One tenant in common cannot recover in ejectment for the joint benefit of himself and his cotenant, but he is entitled to recover his aliquot share or part: *Mobley v. Bruner*, 59 Pa. St. 481; 98 Am. Dec. 360, and note with the cases collected.

EVIDENCE ESTABLISHING IDENTITY OF PERSONS TO A CONVEYANCE.—Evidence *abunde* the instrument is admissible to identify the actual grantor in a deed: *Wakefield v. Brown*, 58 Minn. 361; 8 Am. St. Rep. 671, and note. See further on this question *Mullery v. Hamilton*, 71 Ga. 720; 51 Am. Rep. 238; and *Houston v. Bryan*, 78 Ga. 181; 6 Am. St. Rep. 252.

CITY OF POTWIN PLACE v. TOPEKA RAILWAY CO.

[51 KANSAS, 609.]

MANDAMUS AGAINST CORPORATIONS TO COMPEL PERFORMANCE OF PUBLIC DUTIES.—*Mandamus* lies to compel a street railroad company to perform the duty which it owes to the public to operate its road in accordance with the provisions of an ordinance under which the road was constructed.

STREET RAILROADS—DUTIES ASSUMED BY GRANTEE OF FRANCHISES OF.—The grantee of a street railroad company which, under its deed, takes the road and all of the property and franchises of the grantor as he holds them, and then enters upon and continues the operation of the road, thereby assumes the performance of all public duty theretofore resting on the grantor of furnishing a stated car service as provided for by the ordinance under which the road was constructed.

MANDAMUS TO COMPEL THE PERFORMANCE OF A PUBLIC DUTY—DISCRETION OF COURT.—The granting of a writ of *mandamus* to compel the performance of a public duty rests largely in the discretion of the court, and the writ should be so framed as to best preserve and enforce the rights of all parties.

MANDAMUS against the defendant to compel it to operate its line of street railway in the city of Potwin Place, as required by the city ordinance under which the road was constructed. This ordinance granted the right to the Topeka Rapid Transit Railway Company to construct and operate said road by electricity upon certain streets in the city, and required a stated car service on such streets. After the road was constructed and in operation the company conveyed it by deed to the defendant company, together with all of its property, rights, and franchises. The defendant company then began to operate the road, and continued to operate it for some time, but on October 27, 1892, it ceased to operate it in the city of Potwin Place, and thereafter failed to operate it therein. An alternative writ of *mandamus* was issued in the case, and it was thereafter tried upon its merits.

John W. Day, city attorney, N. H. Loomis, and J. B. Larimer, for the plaintiff.

Rossington, Smith, and Dallas, for the defendant.

¶11 ALLEN, J. Various questions are discussed in the briefs which it will be unnecessary for us to consider at length, because the defendant company asserts that it desires to operate a line of road through the city of Potwin Place, but it objects to operating the line already constructed, because it claims that a better route could be selected both for the company and for the people of Potwin Place. The defendant claims

that it desires, and has asked the passage of, an ordinance which will permit it to operate a line of road on a different route through the old city of Potwin Place, through the addition of Auburndale, in the direction of the insane asylum, and that it would be willing to construct and operate such route on what counsel term "any direct route," but the city and the company have failed to agree on a new line, and the defendant has refused to operate the old one. It is not seriously contended that the old line is unprofitable, but it is claimed that both the interests of the defendant and of the people of Potwin Place, and especially of those living in the western part, known as Auburndale, require that the electric-car service should be extended to the neighborhood of the insane asylum, as the people of Auburndale are now dependent entirely on a horse-car line for street-car facilities. The plaintiff asserts a willingness to grant defendant company a right to construct its line into Auburndale, as desired by the defendant, but insists on the operation of the line already constructed, and that no other route could be selected which would so well accommodate the people of the original city.

Defendant challenges the power of the court to compel it by *mandamus* to operate its road in Potwin Place. Counsel ⁶¹³ concede that a railroad corporation can be compelled to perform its charter obligations, but insist that it is not bound by Ordinance No. 25, and that mainly for two reasons: 1. That a city ordinance does not confer rights and create obligations which can be enforced by *mandamus* in the same manner as charter obligations can be; 2. Because it is not a party to the ordinance, and has not assumed the obligations imposed by its terms. Much is said in the briefs on the question whether the privileges granted to and the duties imposed upon the Rapid Transit Company by Ordinance 25 constitute a franchise, a contract, or a mere license, the defendant contending that they amount to but a license. The term "franchise" seems to be used by the courts with much laxity.

In *Morgan v. Louisiana*, 93 U. S. 223, it is said: "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchise.' It is often used as synonymous with 'rights, privileges, and immunities,' though of a personal and temporary character; so that if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the company. But the term must

always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like."

In *Sioux City Street Ry. Co. v. Sioux City*, 138 U. S. 107, it is said: "The right to operate the railway in the streets is a franchise obtained through power given to the city by the state, but the state reserved the power to regulate such franchise and impose conditions upon it."

In *Atchison Street Ry. Co. v. Nave*, 38 Kan. 744, 5 Am. St. Rep. 800, it was held that "where a city authorizes a street railway company to occupy a certain street and construct a railroad thereon at any time within six months after the authority is granted, the ⁶¹² privilege so given must be used, if at all, before the expiration of the time limited," and that the permission so conferred was, until actually availed of by the company, a mere license which the city could revoke. The question was not presented in that case as to the rights of the parties after the railway company had expended money on the faith of the ordinance in constructing its lines, and had obstructed the street by placing its roadbed and appliances for operating the same thereon.

We think it unnecessary in this case to nicely discuss the use of words. The substantial question we have to decide is whether a duty which the law enjoins rests on the defendant, as a corporation, to operate its road. That corporations may be compelled by *mandamus* to perform their duties to the public is now well settled: *Merrill on Mandamus*, secs. 157-159; *Union Pac. Ry. Co. v. Hall*, 91 U. S. 343; *State v. Hartford etc. R. R. Co.*, 29 Conn. 538; *Haugen v. Albina etc. Water Co.*, 21 Or. 411; *Indianapolis etc. R. R. Co. v. State*, 37 Ind. 489; *State v. Missouri Pac. Ry. Co.*, 33 Kan. 176; *Smalley v. Yates*, 36 Kan. 519.

By the provisions of the ordinance the Rapid Transit Company obtained the right to construct its roadway in the public streets, to maintain and operate it, to transport passengers and parcels by means of electric power, to collect charges and tolls therefor. These privileges were not granted to the company solely for the company's benefit, but rather that the

citizens of the plaintiff city might have the benefit of an improved mode of travel—that they might enjoy the benefits of one of the inventions of the age. By the terms of the ordinance the rights of the company were defined and its duties to the public declared. The company accepted the provisions of the ordinance, and constructed its road under the leave thereby obtained. May it now disregard the obligations imposed on it by its terms? May it still encumber the streets of the city with its track, poles, wire, etc., and refuse to operate its road? It is said that the performance of only charter obligations can be compelled by *mandamus*—that the charter of the defendant company does not require it ^{§14} to operate a line of railway in the city of Potwin Place. The obligations imposed on a railroad company are seldom defined with any degree of particularity by the terms of its charter, and this is especially true of street railways, and in this state, where all corporations are formed under general laws. It is true that the company gets its charter under the general law of the state, but the right conferred by the charter of a street railway company, incorporated for the purpose of operating a street railroad in the city of Topeka, is but a barren grant until it is given form and force by an ordinance of the city permitting it to enter on the streets and construct and operate its lines. From the state directly it derives but the bare power to exist. Its vital force comes from the state, indeed, but through the subordinate agency of the city council, which is given power by the legislature to fix the terms and conditions on which it may actually carry out the purposes of its creation.

Now, while it is true that both the Rapid Transit Railway Company and the defendant, having obtained charters from the state, and also ordinances from the mayor and council of the city of Topeka, granting them the privilege of operating within the city of Topeka, were in a position to carry out some of the purposes of their organization, and might be said to have an active existence, they were still, so far as their operations in the city of Potwin Place were concerned, wholly without power. In no way whatever could they obtain the right to operate a railway within the limits of Potwin Place except by authority of the mayor and council of the city. Having accepted the rights and privileges conferred by the ordinance, we think the duty rests on them, in favor of the plaintiff city and its citizens, to render them the service for

which the privilege was granted. While there may be some doubt as to whether this ordinance granted the Rapid Transit Company a franchise within the strict definition of the word, it is extremely difficult to perceive wherein the rights conferred substantially differ from a franchise derived immediately ^{§15} from the legislature. It is certainly a grant in the nature of a franchise, and one which imposes on the company duties toward the public. A street railway may be compelled by *mandamus* to perform these duties: See Booth on Street Railways, sec. 65, and authorities there cited. Whether the company's duties be denominated contract obligations, or duties imposed by the terms on which a franchise has been granted, the duties are essentially public, and such that no adequate remedy in the ordinary course of legal proceedings is afforded the plaintiff and its citizens.

As to the second contention, that the defendant company is not bound by the ordinance because it is not a party to it, we think it clear that the Rapid Transit Railway Company had the right to sell its property in Potwin Place. That property would be valueless without the power to operate it. The defendant company is incorporated for the purpose of operating lines of street railway in Topeka and vicinity. The deed from the Rapid Transit Company to the defendant, by its terms, grants and conveys to the defendant "all and singular the rights, franchises, powers, privileges, and immunities possessed by it," and conveys by special description the line on Willow avenue, Elmwood avenue, and Laurel avenue in the plaintiff city. We fail to perceive any valid ground on which the defendant can impeach its own title to this property, or its right to operate it under Ordinance No. 25. If it takes the property and the privileges conferred by the deed and the ordinance, clearly it must take them subject to the burdens and laden with the responsibilities declared in the ordinance. The defendant stands in neither the better nor the worse position in relation to the people of Potwin Place than did the Rapid Transit Company. It is not pretended that its charter is not broad enough to warrant its operating this line of road. On the contrary, it affirms its desire to further extend its lines within the limits of plaintiff city. It is conceded that the granting of a writ ^{§16} of *mandamus* rests somewhat in the discretion of the court. In this particular case, it should be issued only in the interest of the public, and to enforce the performance of a public duty by

the defendant. The defendant contends that it will be impracticable to operate the entire line as constructed in Potwin Place and also to operate an extension through Auburndale to the asylum in a manner satisfactory to the public. We, of course, have no right to direct the plaintiff to grant the defendant company any new privileges, but, in enforcing the plaintiff's rights, we ought to take into consideration all of the circumstances, and the needs of all its citizens. The portion of the route which the defendant especially objects to operating is the part on Elmwood avenue from Park to Laurel avenue, and the two blocks on Laurel avenue. The two blocks on Laurel avenue extend east from Elmwood avenue, and therefore lie in the opposite direction from the Auburndale addition. In order to operate these two blocks in connection with an extension through Auburndale towards the asylum, it would be necessary either to double the distance on Laurel avenue each trip, or to alternate cars on each route. The evidence leaves us in doubt as to whether this could be done in a manner satisfactory to the people, and, as we are unwilling to make any order which is likely to prevent adequate service being rendered to the people of the Auburndale addition, we think, in the exercise of our discretion, we should not peremptorily require the operation of the two blocks on Laurel avenue.

It appears that the present terminus of the defendant operated electric line is at the corner of Sixth and West streets; that the company has the right, under the ordinance passed by the mayor and council of the city of Topeka, to construct its lines on any of the streets of Topeka. It is therefore entirely practicable for it to connect its lines now in operation with the east end of the Willow avenue line, and we think it should be required to operate the Willow avenue and Elmwood avenue lines in accordance with the terms of the ordinance.

§17 A peremptory writ will be awarded requiring the defendant to operate its line along Willow avenue, and on Elmwood avenue from the south end thereof to Laurel avenue, and judgment will be rendered against the defendant for costs.

All the justices concurring.

MANDAMUS TO PRIVATE CORPORATIONS TO COMPEL PERFORMANCE OF DUTY.—It may be stated as a general rule governing the exercise of jurisdiction by mandamus over private corporations, that if a specific duty is imposed by law on them, and no other adequate or specific remedy is provided

for its enforcement, the writ of *mandamus* will be granted: *People v. New York etc. R. R. Co.*, 104 N. Y. 58; 58 Am. Rep. 484; *Oliver v. Board of Liquidation*, 40 La. Ann. 321; *Fireman's Ins. Co. v. Mayor etc. of Baltimore*, 23 Md. 296; *State v. Wright*, 10 Nev. 167. When the charter of the corporation or a general statute in force and applicable to the subject imposes a specific duty, either in terms or by fair and reasonable construction and implication, the writ of *mandamus* will be awarded to compel the performance of such duty in the absence of other specific or adequate remedy, and may issue for the benefit of private persons as well as for the public: *Mobile etc. R. R. Co. v. Wisdom*, 5 Heisk. 125; *People v. State Insurance Co.*, 19 Mich. 392; *Union Pacific R. R. Co. v. Hall*, 91 U. S. 343; *State v. Paterson, Newark etc. R. R. Co.*, 43 N. J. L. 505; *State v. Ousatonie Water Co.*, 51 Conn. 137. Or if the duty imposed grows out of and rests upon the principles of the common law, it may be enforced by *mandamus* in the absence of statutory or charter requirements: *State v. Republican Valley R. R. Co.*, 17 Neb. 642, 52 Am. Rep. 424; *People v. Chicago etc. R. R. Co.*, 67 Ill. 118; *In re Trenton Water Power Co.*, 20 N. J. L. 659. In such cases the writ lies to compel a private corporation to exercise its franchise, and to carry out the objects for which it was created: *Railroad Commissioners v. Portland etc. R. R. Co.*, 63 Me. 269; 18 Am. Rep. 208; *State v. Hartford etc. R. R. Co.*, 29 Conn. 538. The reason given for awarding the writ is that such corporations are the creations of the state, and that a supervisory or visitatorial power is always impliedly reserved to see that they act agreeably to the end of their institution. Hence the acceptance of a charter subjects the corporation taking it to the supervision of the proper legal authorities: *State v. Georgia Medical Society*, 38 Ga. 608; 95 Am. Dec. 408; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670.

The effect of the issuance of the writ is to compel the corporate authorities to take the necessary steps in the performance of the duty required, in the manner provided by law, as the mandate of the court necessarily implies that the act to be performed shall be done in a legal manner. Thus the duty of trustees of a corporation to provide for holding a meeting of stockholders, to elect trustees, is a duty, the performance of which may be compelled by *mandamus*. The writ in such case necessarily implies that such election shall be called in accordance with the method provided by statute: *State v. Board of Trustees*, 4 Nev. 400.

The writ of *mandamus* has been issued to private corporations in a great variety of cases to compel the performance of various duties devolving upon them. Thus when a statute makes it the imperative duty of insurance companies doing business within a state in which they are organized to submit their books and affairs to the inspection of officers appointed for that purpose by the secretary of state, and the statute requires the officers or agents of such corporations to cause their books to be open for the inspection of the persons thus appointed, *mandamus* will lie to compel the performance of these duties: *People v. State Ins. Co.*, 19 Mich. 392. If by statute a joint-stock corporation is bound to furnish a list of its stockholders, with their places of residence and the amount of stock held by each, for the purposes of taxation, a compliance with the obligation so imposed may be coerced by *mandamus*: *Firemen's Ins. Co. v. Mayor etc. of Baltimore*, 23 Md. 296. A corporation may be compelled by *mandamus* to pay such taxes as may have been assessed upon its stock: *Town of St. Albans v. National Car Co.*, 57 Vt. 68; *Emory v. State*, 41 Md. 38; *Barney v. State*, 42 Md. 480. The performance of the duty of a private corporation organized to furnish water for irri-

gation purposes, or to supply water to all persons desiring it, has often been coerced by *mandamus*: *Wheeler v. Northern etc. Irrigation Co.*, 10 Col. 582; 3 Am. St. Rep. 603; *Combs v. Agricultural Ditch Co.*, 17 Col. 146; *Pries v. Riverside etc. Irrigating Co.*, 56 Cal. 431. It has been decided, however, that the right of the consumer to such water is an annually recurring right, and that while *mandamus* will lie to enforce such right, it will not lie to secure a perpetual right to the use of water for irrigation: *Townsend v. Fulton etc. Ditch Co.*, 17 Col. 142. When a private corporation organized for the purpose of furnishing water to the inhabitants of a city accepts from the city a franchise and grant of the right of eminent domain, without which the business could not be carried on, the performance of the duty of furnishing water on reasonable terms to every person in the city applying for it may be enforced by writ of mandate, although the grant of the franchise may not in express terms require the corporation to furnish water: *Haugen v. Albina Light etc. Co.*, 21 Or. 411; *State v. Joplin Water Works*, 52 Mo. App. 312. *Mandamus* is also an appropriate remedy to compel a water or canal company to construct and keep in repair a bridge across its ditch if such duty is imposed by statute, and it refuses to comply with an order of a board of supervisors requiring the erection of a bridge by such corporation: *County of Fresno v. Fowler Switch Canal Co.*, 68 Cal. 359. *Mandamus* has been decided to be the proper remedy in behalf of a shareholder to compel the trustees or officers of a private corporation to call an election as required by law if there is no other plain, speedy, or adequate remedy by which such duty may be coerced: *People v. Cummings*, 72 N. Y. 433; *State v. Wright*, 10 Nev. 167. The owner of a lot in a cemetery association is entitled to a writ of *mandamus* to enforce the right of interment of a member of his family in such association: *Mount Moriah etc. Assn. v. Commonwealth*, 81 Pa. St. 235; 22 Am. Rep. 743.

When a corporation is chartered with power to construct a dam across a river, and it is made the duty of the corporation under its charter to make such alterations in highways as are necessary in constructing such dam, a compliance with such duty may be compelled by mandate: *State v. Ousatic Water Co.*, 51 Conn. 137.

When a corporation is authorized by its charter to construct a canal, and it cuts such canal across a highway so as to render a bridge necessary for the use of travelers where none was necessary before, the company may be compelled by mandate to erect and maintain such bridge, at its own expense, without any express provision in its charter to that effect: *In re Trenton Water Power Co.*, 20 N. J. L. 659; *State v. Savannah etc. Canal Co.*, 26 Ga. 665.

The writ of *mandamus* may be issued to enforce a religious trust, and to compel the trustees of a religious corporation to carry out the original object of the organization. Thus when a congregation is incorporated and a church established as a branch of a particular church or denomination, for a particular purpose, the trustees of the corporation may be compelled by *mandamus* to admit a minister who has been duly appointed by the proper authority. It makes no difference that the pastoral office is already filled, or that a remedy might be sought in ejectment, as the mandate is the more complete and effectual means of enforcing the observance of the original trust: *People v. Steele*, 2 Barb. 397; *Friel v. Trustees of First German Society*, 9 Kan. 502. If, by statute, it is made the duty of the officers of a corporation to provide for the payment out of a certain fund of interest on certificates of capital stock issued for its bonds, the writ may be granted to enforce the

performance of such duty: *State v. Trustees of Wabash etc. Canal*, 4 Ind. 495.

Mandamus will also lie to compel the admission of a person fully qualified as a member of a corporation such as a medical society, no other remedy being equally efficacious to enable the applicant to take part in the benefits of the corporate franchise: *People v. Medical Soc. of Erie*, 32 N. Y. 187. A corporation, however, which is required by law to admit to membership therein all persons possessing certain qualifications, will not be compelled by mandate to admit one as a member when it clearly appears that, if admitted, he would at once be liable to expulsion for gross ignorance or misconduct: *Ex parte Paine*, 1 Hill, 665.

It must always be remembered that an important condition to be observed in the application of the rule under consideration is, that a mandate does not issue to compel the performance of any duty by a corporation concerning which its officers are vested with discretionary powers under its charter, or the general law relating to the subject—as, for example, the time and manner of collecting unpaid installments due upon subscriptions to its stock: *State v. Canal etc. R. R. Co.*, 23 La. Ann. 333. Nor will a railroad corporation be compelled by mandate to build a station on its road of sufficient capacity to accommodate the passenger and freight business of that place, when its directors, vested with a discretion in the matter under the general law, have decided not to build, although it is conceded by the corporation that its station already built is not adequate for the purposes mentioned: *People v. New York etc. R. R. Co.*, 104 N. Y. 58; 58 Am. Rep. 494. Nor will *mandamus* issue to so far control the discretion of a railroad company in the matter of the location of its depot, as to indicate in any case the exact spot of such location: *Florida etc. R. R. Co. v. State*, 31 Fla. 482; 34 Am. St. Rep. 80.

It must also be remembered that the existence of an adequate remedy at law is a bar to the exercise of the jurisdiction by *mandamus* over private corporations to enforce a duty which they may owe to an individual or the public. Thus such corporation will not be compelled by such writ to pay a dividend which it has declared, because an action at law is an adequate remedy: *People v. Central etc. Co.*, 41 Mich. 166. Nor will a railroad company be compelled by mandate to receive and transport freight without charging discriminating rates, when the statute makes it liable to the party injured in double the amount of every overcharge: *State v. Mobile etc. R. R. Co.*, 59 Ala. 321.

Under the principle that *mandamus* will not lie against a corporation when some other adequate legal remedy exists, the writ is never issued against private corporations to compel them to perform obligations arising simply under or out of private contracts: *State v. New Orleans etc. R. R. Co.*, 37 La. Ann. 589; *State v. Paterson etc. R. R. Co.*, 43 N. J. L. 506; *State v. Einstein*, 46 N. J. L. 479; *Florida Cent. etc. R. R. Co. v. State*, 31 Fla. 482; 34 Am. St. Rep. 30. A statute, however, may give a remedy by *mandamus* to enforce contract obligations on the part of corporations therein named, which have entered into such obligations under the charter under which they do business: *State v. New Orleans etc. R. R. Co.*, 44 La. Ann. 1026.

Mandamus to Prevent Discrimination by Carriers.—The writ of *mandamus* is often used to compel carriers and other private corporations, subject to similar obligations, to discharge the duty imposed upon them by statute, charter, or the common law of treating all alike, and of extending to all without discrimination the use of their services or of their appliances or

property. Thus a telephone company owning lines, and furnishing connections, facilities, and service to business houses, persons, and companies, can be compelled by *mandamus* to furnish to a person discriminated against the same service that it furnishes to others, independent of any statutory provision against discrimination: *Central Union Telephone Co. v. State*, 118 Ind. 194; 10 Am. St. Rep. 114; *Central Union Telephone Co. v. State*, 123 Ind. 113; *State v. Nebraska Telephone Co.*, 17 Neb. 126; 52 Am. Rep. 404. Or a railroad company may be compelled by *mandamus* to conform its rates and charges to an order made by a state board of transportation preventing and prohibiting discrimination: *State v. Fremont etc. R. R. Co.*, 22 Neb. 313. Or to receive and transport grain to a particular elevator situated on its line of road: *People v. Chicago etc. R. R. Co.*, 55 Ill. 95; 8 Am. Rep. 631. If a railroad company, chartered to carry passengers and freight, establishes commutation rates, and sells commutation tickets to the public in a certain locality, a refusal to sell such a ticket to a particular individual, under the same circumstances and upon the same conditions as such tickets are sold to the rest of the public, is an unjust discrimination, the remedy for which is a *mandamus* to compel the company to furnish the person so refused with a ticket: *State v. Delaware etc. R. R. Co.*, 48 N. J. L. 55; 57 Am. Rep. 543. The duty of a railway company to furnish express facilities to an express company doing, or wishing to do, business over its line may be coerced by the writ of mandate: *Wells, Fargo & Co. v. Northern Pacific Ry. Co.*, 23 Fed. Rep. 469; 10 Saw. 441. Or the duty of a water company to furnish water, if water it has, to all who come within the class or community for whose alleged benefit it is created, may be enforced by *mandamus*: *Price v. Riverside etc. Irrigating Co.*, 56 Cal. 431.

Mandamus to Railroad Corporations.—*Mandamus* always lies against railway companies to compel them to perform any clear legal duty imposed upon them by charter, statute, or the common law: *State v. Jacksonville etc. R. R. Co.*, 29 Fla. 590; *State v. N. E. R. R. Co.*, 9 Rich. 247; 67 Am. Dec. 551; *State v. McIver*, 2 S. C. 25; *People v. Chicago etc. R. R. Co.*, 130 Ill. 175. But a writ of *mandamus* to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, or in performing any other act, can be issued only when there is a specific legal duty on its part to perform that act, and clear proof of a breach of that duty: *Northern Pacific R. R. Co. v. Washington*, 142 U. S. 492. Thus, if the charter of a railway company expressly requires it to maintain its road as a continuous line, it may be compelled to do so by *mandamus*: *Union Pacific R. R. Co. v. Hall*, 91 U. S. 343. Or if the corporation is required by its charter to construct its road and to run its cars to a certain point on tide water, and it has so constructed its road, and used it for years, it may be compelled by mandate to continue to do so: *State v. Hartford etc. R. R. Co.*, 29 Conn. 538. And *mandamus* lies to compel a corporation to build a bridge in accordance with an express provision of statute: *New Orleans etc. Ry. Co. v. Mississippi*, 112 U. S. 12; *People v. Boston etc. R. R. Co.*, 70 N. Y. 569; or to restore a public highway to as good condition for the public use as it was in before the railway interfered with it in constructing a crossing: *Mondeville v. Ohio R. R. Co.*, 37 W. Va. 92. It is the proper remedy to compel a railroad company in making its track across a navigable stream to pursue the mode prescribed by its charter, and not to obstruct navigation: *State v. Northeastern R. R. Co.*, 9 Rich. 247; 67 Am. Dec. 551. And a mandate lies to require a railroad company having its track upon, along, or across the streets and alleys of a city, to so build or construct its track and level.

grade, and maintain such streets and alleys, as to render their use and the crossing of the track convenient for the public: *Indianapolis etc. R. R. Co. v. State*, 37 Ind. 489; *People v. Chicago etc. R. R. Co.*, 67 Ill. 118; *State v. St. Paul etc. Ry. Co.*, 35 Minn. 131; 59 Am. Rep. 313. It may also be compelled by *mandamus* to bridge its tracks where they cross the streets, and to construct and maintain suitable approaches to such bridge or bridges: *State v. St. Paul etc. Ry. Co.*, 35 Minn. 131; 59 Am. Rep. 313; *State v. Minneapolis etc. Ry. Co.*, 39 Minn. 219; or, in such case, to construct a viaduct over its tracks: *State v. Missouri etc. Ry. Co.*, 33 Kan. 176. And a railroad company may be compelled by *mandamus* to restore to its former condition of usefulness a highway across or along which it has constructed its track: *Cummins v. Evansville etc. R. R. Co.*, 115 Ind. 417; *State v. Hannibal etc. R. R. Co.*, 86 Mo. 13; *City of Oakbrook v. Milwaukee etc. R. R. Co.*, 74 Wis. 534; 17 Am. St. Rep. 175; *People v. Dutchess etc. R. R. Co.*, 58 N. Y. 152; *Pittsburgh etc. R. R. Co. v. Commonwealth*, 104 Pa. St. 583; or to erect and maintain a depot at a specified place on its line of road when demanded by the public convenience and necessity, and such duty is imposed upon it by its charter: *Railroad Commissioners v. Portland etc. R. R. Co.*, 63 Me. 269; 18 Am. Rep. 306; *People v. Chicago etc. R. R. Co.*, 130 Ill. 175; or to resume the use of a station which it has abandoned: *State v. New Haven etc. Co.*, 41 Conn. 134. *Mandamus* lies to compel a railroad company to perform a legal duty in stopping all its regular trains at certain stations to discharge and receive passengers and freight: *Illinois etc. R. R. Co. v. People*, 143 Ill. 434; *New Haven etc. Co. v. State*, 44 Conn. 376-384; or to erect a cattle-guard for its railroad track as required by statute: *Boggs v. Chicago etc. R. R. Co.*, 54 Iowa, 435; or to fence its right of way: *Ohio etc. Ry. Co. v. People*, 121 Ill. 483.

When a railroad corporation has completed its road between termini named in its charter or articles of incorporation, it may be compelled by *mandamus* to operate the road between such points, if it abandons or ceases to operate a part of the route: *People v. Albany etc. R. R. Co.*, 24 N. Y. 261; 82 Am. Dec. 295; *State v. Hartford etc. R. R. Co.*, 29 Conn. 538. But when such company owns two lines of road and can substantially accommodate the people of the state by operating one line between the same points, and can abandon the other line without serious detriment to any considerable number of people, it cannot be compelled by *mandamus* to operate both lines at a great sacrifice: *People v. Rome etc. R. R. Co.*, 103 N. Y. 95. Nor will such company be compelled by *mandamus* to construct its road to a certain terminal point when a specific duty so to do is not imposed upon it by its charter or the general law: *State v. Southern Minn. R. R. Co.*, 18 Minn. 40. Nor will the writ lie to compel a railroad company to build a station at a particular place, unless there is a specific duty to do so imposed by charter, statute, or otherwise, and clear proof of a breach of such duty: *Northern Pacific R. R. Co. v. Washington*, 142 U. S. 492. Although *mandamus* is an appropriate remedy to compel a railway corporation to perform any specific duty which it owes to the public under its charter or the general law, as the owner or operator of a railroad, as to replace a part of its track which it has wrongfully taken up, or to operate its road as a continuous line, or to build a bridge, or to run daily trains of a certain number, yet if the company is wholly unable, because of financial embarrassment or otherwise, to discharge the duties which it owes to the public and which the law has imposed upon it, *mandamus* will not be granted to compel the performance of such duty for the reason, that if granted it would be unavailing. The proper remedy is

such case is a proceeding in the nature of a *quo warranto*: *Ohio etc. Ry. Co. v. People*, 120 Ill. 200. *Mandamus* is the proper remedy to compel a railroad company to deliver to a certain elevator whatever grain in bulk may be consigned to it upon the line of its road: *Chicago etc. R. R. Co. v. People*, 56 Ill. 385; 8 Am. Rep. 690; or to compel it to comply with the statutory duty on its part of taking tax receipts from taxpayers in payment for freight and passenger charges: *Mobile etc. R. R. Co. v. Wisdom*, 5 Hark. 125.

CRAWFORD v. CITY OF TOPEKA.

[51 KANSAS, 766.]

MUNICIPAL CORPORATIONS—POWER TO REGULATE ERECTION OF BILLBOARDS.

A city may prohibit the erection of insecure billboards or other structures, and require the owners of those erected to maintain them in a secure and safe condition, and may provide for their removal at the expense of the owner in case they become dangerous to the public or to individuals.

MUNICIPAL CORPORATIONS—PROHIBITION BY OF BILLBOARDS, ETC.—An ordinance providing that "no person shall erect any billboard or other structure for advertising purposes unless the same is placed at such distance from the line of any street or sidewalk as shall exceed at least five feet the height of such billboard or structure," and prescribing a punishment for its violation, is unreasonable and void.

PROPERTY—RIGHT TO BUILD UPON.—The owner of real estate has the right to erect such buildings or other structures thereon as he may please, and may put the premises to any use which may suit his pleasure, provided he does not, in so doing, imperil others.

A. A. Hurd and Robert Dunlap, for the plaintiff in error.

D. C. Tillotson, city attorney, for the defendants in error.

see JOHNSTON, J. L. M. Crawford brought this action to enjoin the city of Topeka and its street commissioner from tearing down and removing billboards, fences, and other structures upon which advertisements were posted. It appears that Crawford, under agreements with the owners of lots in different parts of the city, had erected upon the line of the lots structures similar to closely built fences, which were from eight to ten feet in height, upon which to post bills and advertisements of shows and entertainments which were to occur at his opera-house in the city. In some cases structures like fences which were already upon the lots were used by him for this purpose, and in other cases the agreements with the owners provided that the structures should inclose the lots as a fence. Many of them had been in use for several years, and in March, 1890, the street commissioner notified Craw-

ford that they must be taken down and removed within five days, so as to conform with a certain ordinance, or the commissioner would remove them. From the testimony it appears that most of them were substantial and safe structures, and the objection by the city authorities was, not that they were insecure, but rather that they did not comply with the provisions of an ordinance previously passed. It provides that "no person shall erect any billboard or other structure for advertising purposes unless the same is placed at such distance from the line of any street or sidewalk as shall exceed at least five feet the height of such billboard or structure; nor shall any person attach any sign or bulletin to any lamp-post ⁷⁶¹ in this city; and any person found guilty of violating any provision of this section shall, on conviction, be fined in a sum not less than three dollars nor more than twenty dollars for each offense, and each day's continuance after conviction will be deemed a separate and distinct offense."

The reasonableness of this regulation and the validity of the ordinance were the principal subjects of contention in the court below, and the ones presented for decision here. At the end of the trial the temporary injunction originally granted was dissolved, and the relief asked by the plaintiff was denied.

We think the ordinance is not reasonable nor valid; hence the ruling of the court cannot be sustained. As has been seen, it proscribes the erection or use of any structure near the lot line for advertising purposes, no matter how substantial and secure it may be. Municipalities may be and are vested with large powers in protecting the health and safety of the people and in promoting the welfare of the public. They have been given authority to prevent and remove nuisances, to protect the walks and ways, and, where they are dangerous, may compel the owners of adjacent property to erect and maintain railings, safeguards, and barriers along the same. They may enter and inspect all dwelling-houses, yards, inclosures, and buildings, to ascertain whether any of them are in a dangerous state, and may take down and remove such structures as have become insecure or dangerous; and, further, may require the owners of insecure and dangerous buildings and other erections to render the same secure and safe, at the owner's cost. They may regulate the use of the streets and public grounds, and may regulate or prohibit awnings and awning-posts, and all other structures projecting upon or over

the street or sidewalk. Fire limits may be established, within which the erection of wooden buildings or structures which would readily communicate fire may be prohibited: Gen. Stats. of 1889, par. 555. In none of these provisions do we find anything which warrants the city to prohibit the ⁷⁶³ erection of safe and substantial structures on any portion of a lot, if indeed any such power can be given. In general, it may be said that the owner of real estate has the right to erect such buildings or other structures upon it as he may please, and put the premises to any use which may suit his pleasure, providing that he does not in doing so imperil or threaten harm to others: Tiedman's Limitation of Police Power, 439. All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public; but a limitation without reason or necessity cannot be enforced. In what way can the erection of a safe structure for advertising purposes, near the front of a lot, endanger public safety any more than a like structure for some other lawful purpose? Why does the posting or painting of an advertisement upon a secure wall or structure render it insecure? An owner may desire to use a structure or billboard for an inclosure of his lot, as well as for posting advertisements. In one instance that was the desire and purpose of the owner in this case. If the wall or inclosure was ten feet high, then under the ordinance the owner would be required to set it back fifteen feet from the front of the lot. What reason is there for the surrender or loss of the use of that portion of the lot? Or why should the pasting of a piece of paper upon a secure inclosure make such a loss necessary? Although the police power is a broad one, it is not without limitations, and a secure structure which is not an infringement upon the public safety, and is not a nuisance, cannot be made one by public fiat and then prohibited: *Yates v. Milwaukee*, 10 Wall. 497; 1 Dillon on Municipal Corporations, 374. It is doubtless within the power of the city to prohibit the erection of insecure billboards or other structures, require the owners to maintain them in a secure condition, and to provide for their removal at the expense of the owners in case they become dangerous. Perhaps regulations may be made with reference to the manner of construction so as to insure safety, but the prohibition of the erection of structures ⁷⁶³ upon the lot line, however safe they might be, would be an

unwarranted invasion of private right, and is without legislative authority.

In *Langan v. City of Atchison*, 35 Kan. 318, 57 Am. Rep. 165, an insecure billboard which had been fastened to the sidewalk fell upon one who was passing, and injured him. It appeared to have been in a weak and insecure condition for some time, and that the officers of the city knew that it was not erected in a safe and proper manner, and before its fall that it was in a condition to endanger persons passing upon the sidewalk. It was held that the city was liable in damages for the injury, upon the theory that it was its duty to keep the streets and walks in a safe condition for persons passing over and along them. It was further held that it was the duty of the corporate authorities to remove or abate any nuisance, and that, under the power given to the city to prevent and remove nuisances, and to regulate all structures projecting upon or over the streets or walks, it was bound to remove or protect the sidewalk from the imperfectly constructed and insecure billboard standing so near the sidewalk as to fall upon it. This authority sanctions the regulation of such structures so far as to make them secure; but nothing is said which would justify the prohibition of the erection of structures that are absolutely safe. None of the structures proposed to be removed extended beyond the lot, and hence are not to be regarded as if they projected over the street. The regulations as to the erection and maintenance of such structures may be made sufficiently rigid to fully protect the public; but they must be reasonable, and when they pass beyond the bounds of reason and necessity, and impair private property rights, they must be pronounced invalid. The unreasonableness of the ordinance in question is easily seen when it is considered that the mere posting of a harmless paper upon a structure changes it from a lawful to an unlawful one. A person may erect a fence around his lot without violating the ordinance; but just as soon as an advertisement is posted or painted ⁷⁶⁴ thereon it is brought within the condemnation of the ordinance, and the owner is liable to prosecution and punishment.

Treating the ordinance as unreasonable and invalid, as we must, the ruling of the court below in denying the injunction was erroneous, and hence there must be a reversal.

All the justices concurring.

REAL PROPERTY—POWER OF MUNICIPAL CORPORATION TO RESTRICT OWNER'S USE OF.—An owner of property cannot be prohibited by a legislative body from conducting thereon a lawful business, unless such business is of such a character as to be a menace to the surrounding property owners: *Ex parte Whitwell*, 96 Cal. 73; 35 Am. St. Rep. 152, and note; *Ex parte Sing Lee*, 96 Cal. 354; 31 Am. St. Rep. 218, and note; *State v. Tenant*, 110 N. C. 609; 28 Am. St. Rep. 715, and note; *Armstrong v. Medbury*, 67 Mich. 250; 11 Am. St. Rep. 585. In the following cases it is held that the owners of property can use it in any manner they may see fit, so long as they do not injuriously affect the rights of others: *Durham v. Musselman*, 2 Blackf. 96; 18 Am. Dec. 133; *Haldeman v. Bruckhart*, 45 Pa. St. 514; 84 Am. Dec. 511; *Schwartz v. Gilmore*, 45 Ill. 454; 92 Am. Dec. 227; and *Trustees etc. v. Spears*, 16 Ind. 441; 79 Am. Dec. 444, and note.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

KEATING v. MICHIGAN CENTRAL RAILROAD CO.

[97 MICHIGAN, 154.]

MASTER AND SERVANT.—A MASTER IS NOT RESPONSIBLE FOR THE CONSEQUENCES OF BAD ADVICE GIVEN BY A SERVANT whose duties do not include the giving of advice and counsel generally, and the advice given relates to the conduct of another not connected with or relating to the business in which the servant is at the time engaged.

RAILROAD COMPANY, WHEN NOT LIABLE FOR INJURIES CAUSED BY FOLLOWING ADVICE OF SERVANT.—No recovery can be had against a railroad company where one of its servants took a child with him upon a gravel train, of which he was in charge, to a place where a siding was in course of construction; and later in the day, while they were sitting near the track watching the laborers, the child expressed a wish to go home, and the servant told him to get on a freight train which happened to be approaching, and the child thereupon mounted a pile of gravel by the side of the track, and when the caboose of the freight train came abreast of him, reached out to take hold of it, the gravel slipped from under his feet while he was so reaching out, and he was consequently thrown between the wheels and seriously injured.

ACTION against a railroad company for personal injuries.

Black and Dodge, for the appellant.

M. V. and R. A. Montgomery, for the defendant.

155 MONTGOMERY, J. This is an action for personal injuries, by which the plaintiff lost one foot and received serious injuries to the other. At the time of the alleged injury plaintiff was about seven years of age. The injury consisted in being run over by a car of the defendant company, the crushing of an ankle, requiring amputation of that leg, and an injury to the heel of the other foot.

The injury occurred in the city of Lansing, near the passenger depot of defendant at that place. The defendant's main track runs north and south past the station. To the west of the main line was a sidetrack in the process of construction, upon which defendant had a number of men at work. The plaintiff lived with his father and mother about four rods west of the sidetrack. On the day of the injury, defendant, while engaged in putting in the sidetrack west of its main track, was drawing sand and gravel with a gravel train in charge of one Harris and one Conners. In the morning the train had stopped in front of plaintiff's father's house, and Conners had taken plaintiff on the train with him. At noon plaintiff went home with some of the men who worked on the ^{1st} gravel train and boarded with his father. Conners told him to come back in the afternoon, and he would give him a ride. After dinner he went back to where the men were working. He carried water for the men, and the workmen took him and another boy on the train with them to the place from which they got their gravel. The gravel was unloaded on the west side of the main track, and then the gravel train was backed upon a sidetrack to the east of the main track. Conners and the plaintiff, between three and four o'clock, were sitting on some ties by the side of the track, looking at the men, and just then a freight train of the defendant was seen coming down the main track from the north. The plaintiff told Conners that he was hungry, and wanted to go home, and Conners said, "Here comes the freight train, you can get on that. It will go slow by the house, and you can jump off." The plaintiff stayed there until the train came along, and Conners then said to him, "Get on the back car, caboose." When Conners told him to get on the caboose, the plaintiff was about ten feet from it. The brakemen and shovelers were standing around within hearing. The plaintiff went over and got upon the gravel which had just been thrown off from the gravel train, and which was piled about two feet high, and when the car (caboose) came by he reached up, and caught it, and, when reaching out, the gravel slipped from under him, and he slid down between the wheels of the forward truck, and received the injury for which he seeks to recover.

The question of first importance is whether the defendant is shown to be guilty of actionable negligence. It is the theory of the plaintiff that the injury was caused by the neg-

lect of defendant's agents to prevent the plaintiff from coming upon its grounds; and, secondly, in not using ordinary care when he was upon such grounds, and in a place of danger, to prevent his injury. As preliminary to ¹⁵⁷ a correct application of the principles involved, it is important to ascertain the proximate cause of the injury, and to determine whether this consisted of a negligent or wrongful act of any servant of the defendant while in the line of his employment.

It is clear that the plaintiff did not receive his injury because of being permitted to be on defendant's grounds, or because defendant's agents, while acting within the scope of their employment, failed to prevent him from getting into a dangerous position. The record shows that the boy was in no danger until directed by Conners to board the moving train. There is nothing to show that he would have received this injury, or any other, from being on the gravel bed between the tracks. The injury occurred because of his attempt to catch hold of and mount a moving car. To this act he was led by the direction of Conners, and because of this act he was injured. Can it be said that Conners was in the line of his duty, or acting within the scope of his employment, in the direction which he gave? No act required of him as foreman or agent of the defendant, no act done or thing omitted by him or by the other servants of the company, in the prosecution of their work, caused plaintiff's injury. Neither the condition of the work nor the manner of its doing was the cause of the accident. To construct the sidetrack was within the scope of Conner's employment, and doubtless any injury inflicted upon the plaintiff recklessly or negligently, in connection with any service which he was performing for the company, might be redressed in an action against the principal; but the principal is not responsible for bad advice by its roadmaster or servants, whose duties do not include the giving of counsel or advice generally, and when such advice relates to the conduct of another not connected with, or relating to, the business with which the servant is at the time connected. In this case the management of the train by the instrumentality of ¹⁵⁸ which plaintiff was injured was entirely foreign to the employment of the servant Conners.

The case differs in no respect from what it would be if the train inflicting the injury had been upon the track of, and in charge of, the servants of another company. To justify a

recovery in either case, because of the act of the train men in charge of the freight train, it would be essential to show that the servants in charge of that train were guilty of some negligence. This, of course, could not be done under the circumstances of this case; hence the company running that train would not be liable. Further, in determining whether this was in the line of Conners' employment, the fact that the reckless act induced by his advice was the boarding of a moving train of cars with which he had nothing to do, and with the control of which he had not been intrusted, puts no different phase on his act than would be present in case any equally reckless conduct had been advised, although such conduct had no relation to the trains of defendant. Suppose that Conners had advised plaintiff to grasp a live electric wire, or to embark in dangerous waters in a frail skiff, would the railroad company, because Conners was employed to grade this sidetrack, and because the advice was given while the boy was on the company's grounds, be answerable for the wrong. We think not. The act was the act of Conners alone, outside of every requirement of his duty. If the plaintiff's testimony presents the true state of facts, Conners was guilty of surprising recklessness, little less blameable than would have been the act of pushing the boy towards or under the passing car; but as the act was disconnected from any duty that he was performing for the railroad, there was no liability on its part for the resulting injury: See *Chillicothe v. Raymond*, 80 Mo. 185.

This case does not involve, as we view it, the same principle which has been applied in the class of cases, some of ¹⁵⁰ which are cited by plaintiff's counsel, where injury has resulted from leaving a dangerous substance exposed, or leaving a pitfall for others, or leaving dangerous machinery in a position where children, acting upon childish instincts, have attempted its use to their injury. These cases, of which *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, is an illustration, are distinguishable. Here there was no fault in the management of the train. The passing of the train was a condition, Conners' wrongful advice the cause, of the injury. Nor do the cases which hold that the servant in charge of machinery, after discovery of the presence of another, though he be a trespasser, is bound to use precautions to prevent any injury, apply, if we are correct in holding that the proximate cause of the injury was not any fault of the agents of the de-

fendant in charge of the freight train, but the wrongful and negligent act of Conners, outside the scope of his employment.

The judgment will be affirmed.

The other justices concurred.

Cases somewhat similar to the principal are *Morris v. Brown*, 111 N. Y. 318, 7 Am. St. Rep. 751, where an employer was held not liable for injuries to a person whom an employee had without authority invited to ride on a dump-car: *Cook v. Houston etc. Co.*, 76 Tex. 353; 18 Am. St. Rep. 52, where a like ruling was made in regard to the death of a child who was invited on board a tugboat by the defendant's employees against his orders, and drowned; and *Chicago etc. Ry. Co. v. West*, 125 Ill. 320, 8 Am. St. Rep. 380, where it was held to be outside the scope of an engineer's authority to invite a person to ride on his locomotive, and that such person, if injured while riding on the locomotive, could not recover against the company.

STATE BANK OF MIDLAND v. BYRNE.

[97 MICHIGAN, 178.]

PAYMENT, WHAT AMOUNTS TO.—The law requires payment in money, and nothing else answers the purpose, unless accepted by the creditor or his agent, duly authorized.

DEBTOR AND CREDITOR—EXTINGUISHMENT OF DEBT, WHEN NOT EFFECTED.

A debtor who seeks to pay a debt through his debtor, thereby securing his own claim, acts at his peril, and is not exonerated from his obligation until his debtor performs his part by satisfying the creditor.

NEGOTIABLE INSTRUMENTS—PAYMENT OF DRAFT, WHAT DOES NOT AMOUNT TO.

The fact that it is the understanding between a bank and a depositor that drafts upon the latter, which the bank receives for collection, are, when accepted and passed back to the bank, to be treated as checks and charged against his account, cannot, as against the drawer of an instrument so accepted and redelivered, operate as payment thereof.

ASSUMPSIT.

James H. Lynch and D. D. Jayne, of counsel, for the appellant.

M. H. Stanford, for the plaintiff.

¹⁷⁸ **HOOKEE**, C. J. Plaintiff, a bank at Midland, in this state, on August 31, 1891, sent to the Milford State Bank, at Milford, in this state, a demand draft upon the defendant, Patrick Byrne, drawn by the Midland Salt and Lumber Co., the title to which was in the plaintiff at the time of forwarding. The defendant, at that time, and for several years previous, had resided and been engaged in active business at Milford, and kept an account with the Milford State Bank.

When drafts upon defendant were sent to the Milford State Bank for collection, Mr. Byrne, when he accepted the same, wrote his acceptance thereon in the usual form. Instead of paying the amount of the draft in cash, or drawing his check ¹⁷⁹ for the same on his account to pay the draft, and taking the draft, his uniform custom had been to pass back to the bank the draft, after indorsing his acceptance thereon, and the same was treated and understood by both Mr. Byrne and the Milford State Bank as in all respects equivalent to a check, and when he settled with the bank at intervals, these accepted drafts were treated by the bank as vouchers.

When the draft in question was presented to Mr. Byrne on August 31st, in accordance with this understanding or custom with the Milford bank, he wrote his acceptance on the same, passed it back to the bank, charged himself with the amount of the draft in his own pass book, and paid no further attention to the matter. The draft in question was a demand draft, mailed from Midland on the 31st of August, and was on the same day presented and accepted by defendant. At the time of this transaction, up to and at the time of the bank failure, Mr. Byrne had on deposit a sum of money considerably in excess of the amount of this draft. The Milford bank closed its doors soon after this transaction. It did not remit to the Midland bank; in fact, it made no entries on its books, except a short memorandum in the collection register, and the accepted draft remained in the bank until its doors were closed on September 9th following. The bank commissioner found the accepted draft among the papers of the bank, and returned the same upon September 14th to the plaintiff, who brought suit upon it. The only question in the case is whether the transaction between the defendant and the Milford bank was a payment of the draft.

The counsel for both parties recognize the Milford bank as plaintiff's agent for the collection of the draft. It is elementary doctrine that—

"An agent authorized merely to collect a demand, or to receive payment of a debt, cannot bind his principal by any arrangement short of an actual collection and receipt of ¹⁸⁰ the money": *Ward v. Evans*, 2 Ld. Raym. 928; *Ward v. Smith*, 7 Wall. 451; *Pitkin v. Harris*, 69 Mich. 133; *Hurley v. Watson*, 63 Mich. 531.

The most that can be claimed for this transaction is that the defendant, by accepting and delivering the demand draft,

directed the Milford bank to pay the same, and charge the amount to his account, and that the bank promised to do so. As between them, it was, perhaps, understood that defendant had paid this draft, but it was in law no more than an attempted substitution of the bank for himself as debtor. Had the acceptance been a check, and the check drawn upon another bank or private person, the effect would have been in law the same. The law requires payment in money, and, as already shown, nothing else answers the purpose, except by agreement with the creditor, or his agent duly authorized to accept something else. As between defendant and his bank, it was clearly the latter's duty to honor his check (or acceptance, which, under their custom, was practically a check) by payment of the draft, but the creditor was no party to that transaction. The bank was plaintiff's agent to collect the money, not to make an arrangement by which it should assume the debt. A debtor who seeks to pay a debt through his debtor, thereby securing his own claim, acts at his peril, and is not exonerated from his obligation until his debtor performs his part by satisfying the creditor.

There are a few authorities which, at first blush, might be supposed to justify a different conclusion. Morse on Banking, section 805, is authority for the following:

"By custom, banks receive their own certificates of deposit as payment, and such custom will be judicially noticed by the courts, and will justify a collecting bank in receiving its own certificate of deposit in payment of paper it holds for collection; and the debtor is discharged, even though the bank fails before remitting. And especially will this be so where the owner of the paper directed the ¹⁸¹ bank to remit by draft, for he is presumed to have intended a draft of the collecting bank."

The case of *British etc. Mortgage Co. v. Tibballs*, 68 Iowa, 468, is the authority cited for this. It bases the decision upon the usage of banks, of which it says courts will take judicial notice. This was a certificate of deposit. If there is any usage by which certificates of deposit are so used, it is plain that such certificates are but the promise of the bank to pay; and, were it the certificate of deposit or certified check of another bank, it would be the mere substitution of one obligation for another, and it is difficult to see any difference between such a case and one where the certificate of deposit or certified check is that of the collecting bank. This hold-

ing is not supported by citations. Mr. Justice Reed dissents in an able opinion, adhering to the common-law rule.

Another case, that of *Welge v. Batty*, 11 Ill. App. 461, is relied upon. Here the debtor drew a check on the collecting bank, having at the time a deposit sufficiently large to cover it. The check was received and draft delivered, and the amount was charged against the debtor on his bank account. A draft was sent by the collecting bank, but, before it got around, the bank failed. This was held to be a payment, the court saying that it would have been an idle ceremony for the debtor to draw his money out of the bank, and pay it back again to the bank. Here, again, the court cites no authority to support its decision.

The great weight of authority is against these cases. The payment by check, certificate, or what not is not for the convenience of the creditor, and he has no concern with the fact that it is the custom of the bank to take checks in payment. The fact that a debtor has a credit at a bank is not conclusive evidence that the bank has money with which to honor his checks. As in this case, the bank may be insolvent ¹⁸² when it receives the check, and there is no good reason apparent for permitting the depositor of an insolvent bank to pay his debt with worthless paper, thereby making his creditor a loser. No custom should be allowed to justify such a transaction, unless it be in a case where the creditor is connected with, and a party to, the custom. Many cases can be found where checks are received and operate as payment, but they are usually in suits between the creditor and the collecting bank, where a different question is involved.

Upon the undisputed facts of this case the plaintiff was entitled to the verdict, which the court properly directed.

Judgment affirmed.

MCGRATH, LONG, and GRANT, JJ., concurred. MONTGOMERY, J., did not sit.

PAYMENTS OTHER THAN IN MONEY, EFFECT OF.—The general rule is that payment must be made in money, where there is no valid agreement to the contrary: *Vansickle v. Furgeson*, 122 Ind. 450; but that it may be made in any mode which the parties agree shall be treated as the equivalent of a money payment: *Blair v. Carpenter*, 75 Mich. 167. This rule was applied in regard to a bill of exchange drawn by the debtor in *Murray v. Gouverneur*, 2 Johns. Cas. 438, 1 Am. Dec. 177; and to one drawn by his agent in *Taylor v. Conner*, 41 Miss. 722; 97 Am. Dec. 419. So also a bank check is not payment of a pre-existing debt until cashed, without an agreement to receive it

as such: *Barnet v. Smith*, 30 N. H. 256; 64 Am. Dec. 290; *Strong v. King*, 35 Ill. 1; 85 Am. Dec. 336; *Briggs v. Holmes*, 118 Pa. St. 283; 4 Am. St. Rep. 597; *Steinhart v. National Bank of D. O. Mills & Co.*, 94 Cal. 362; 28 Am. St. Rep. 132; *Good v. Singleton*, 39 Minn. 340; *Henry v. Conley*, 48 Ark. 267; *Comptoir d'Escompte v. Dresbach*, 78 Cal. 16; *Holmes v. Briggs*, 131 Pa. St. 233; 17 Am. St. Rep. 804. That debtor banks have a custom of sending drafts as a means of transferring money does not imply that such drafts are accepted absolutely as payment: *Thomas v. Supervisors of Westchester County*, 116 N. Y. 47.

RAGON v. TOLEDO, ANN ARBOR, AND NORTH MICHIGAN RAILWAY COMPANY.

[97 MICHIGAN, 265.]

NEGLIGENCE, PLEADING IN ACTIONS FOR—THERE IS NO VARIANCE where the declaration in an action by a railroad employee to recover damages for personal injuries states that the defendant permitted a deep hole or rut to exist in the track, into which the plaintiff stepped, and the evidence tends to prove that there were several holes. This is not a case of proving a number of defects as a ground of inference that another distinct defect existed, but it amounts to showing that several defects existed, one of which might have caused the injury.

RAILROAD COMPANIES, DUTY OF, TO FURNISH SAFE APPLIANCES FOR EMPLOYEES.—A railroad company is required to provide reasonably safe appliances, and keep them in repair, and provide a reasonably safe place for the employee, so as not to expose him to unnecessary danger, but it is not within the province of courts or juries to prescribe the manner of using its tracks, or the character of its appliances, by verdicts and judgments which disregard its right to conduct its business in the manner usual with well-managed roads, and as good railroading demands.

MASTER AND SERVANT—LIMIT TO SERVANTS' RIGHT OF RECOVERY FOR INJURIES CAUSED BY DEFECTIVE APPLIANCES.—Obvious imperfections in methods or machinery, existing at the time of the employment, cannot be made the basis of a liability in favor of an employee who suffers an injury in the course of his employment, for the reason that the employer has a right to have and use imperfect methods and tools, and to ask others to enter his employ to aid him in such use.

MASTER AND SERVANT—ASSUMPTION OF RISKS—AN EMPLOYEE MAY CONTRACT TO USE DEFECTIVE MACHINERY, and where he knows of the defect, and uses the machinery voluntarily, the law warrants the inference that he assumes the incident risks.

MASTER AND SERVANT—ASSUMPTION OF RISKS, LIMITS OF DOCTRINE AS TO.—The doctrine that a servant's want of knowledge of a defect in the appliances furnished by the master precludes the inference of an assumption of risks and makes the master liable does not justify carelessness on the part of the servant. The master has a right to expect him to be alert to inform himself of existing conditions, and he cannot attack the master from the shelter of unjustifiable ignorance of the business, machinery, and methods which he is employed to use.

RAILROAD COMPANIES—SERVANT'S NOTICE OF DEFECT IN TRACK, EFFECT OF.—The fact that a railroad company has suffered an unfilled space to

remain between the ties of a sidetrack will not enable a brakeman to recover damages for personal injuries, caused by stepping into the hole and being caught by a car which he was uncoupling before he could extricate his foot, if the condition of the track at the time of the accident was so manifest, that the plaintiff was, or ought to have been, aware that the defect existed.

RAILROAD COMPANIES—CARE REQUIRED OF SERVANT IN UNCOUPLING A CAR.—A railroad company has a right to expect that a brakeman will not step between a moving car and engine for the purpose of uncoupling them, without first examining the character of the roadbed, and if he is injured by a defect in the track, in consequence of neglecting this precaution, he cannot recover damages from his employer.

ACTION by brakeman to recover damages for personal injuries.

Lyon and Hadsall, and Alexander Smith, of counsel, for the appellant.

Watson and Chapman, for the plaintiff.

367 **HOOKE, C. J.** The plaintiff, a brakeman upon defendant's freight train, obtained judgment in the circuit court for an injury sustained by being run over by his train at Durand. Defendant's counsel contend that the judge should have directed a verdict against the plaintiff.

It became necessary to leave a car upon the defendant's sidetrack, and, after setting the switch, the plaintiff signaled to the engineer to back up, which he did, and plaintiff stepped between the car and the tender to uncouple the car. Having some difficulty, and being near the switch, he stepped out to avoid the danger of walking over the switch bars, entering again after the car had passed them. No one saw the accident, but plaintiff states that he stepped into an unfilled space between the ties, and before he could extricate his foot it was caught by the brake-beam of the tender, at the heel, and his toe dragged along the track. At this time he was inside the main track, and realizing that he was near the frog, he threw himself over the rail, sacrificing his foot rather than his life.

At the outset a question of variance arises. The first count of the declaration states that defendant permitted a deep hole or rut to exist in its track, into which plaintiff stepped. A second count states it as existing in the sidetrack, between the ties, which space it was defendant's duty to fill with dirt. The alleged variance consists in the failure of the plaintiff to prove the existence of any definite deep hole in the track.

He testifies that he did not see the hole, but that he stepped in one, and was ²⁶⁸ caught. He attempts no description of its size or depth, further than to say that he thought he went down about eight inches, and claims to know there was one only by reason of having stepped into it. He does not fix the exact location of it. Other testimony on the part of the plaintiff tended to show that the spaces between the ties had not been filled with dirt in the vicinity of the place of the accident, and between the place where the foot was cut off and the switch. This testimony fairly tended to prove that the spaces were filled at the middle of the ties, but at the rail the dirt was from two to four inches below the top of the ties. From the very nature of railroads, the hole in the track mentioned in the declaration must have been between the ties, and evidence that, for a space of twenty feet or more, the ballast did not fill the spaces, tended to prove the existence of a number of holes. Upon plaintiff's theory he stepped into but one hole, and the fact that he could not tell just where it was should not prevent recovery of his damages if he were lawfully entitled to them. If it turned out that there were several holes, that fact was not inconsistent with his claim, but tended to support the allegations that a hole existed, and that the spaces were not filled with dirt. It is not a case of proving a number of defects as a ground of inference that another distinct defect existed, but it was showing that several defects existed, one of which might have caused the injury.

This case went to the jury upon two possible theories, viz: 1. That the plaintiff stepped into a hole about eight inches deep in defendant's track, which track was otherwise smooth and in good condition; 2. That the roadbed was in bad condition for want of ballast, leaving places between the ties, into one of which plaintiff stepped, and that his foot was caught by reason of that fact.

²⁶⁹ The first count was supported only by the testimony of the plaintiff, if it can be said to have been supported by proof. He testified that he stepped into a hole about eight inches deep. He said that, so far as he knew, the track was otherwise smooth and in good repair, and that he never saw the hole; that he only knew of its existence by stepping into it. No other evidence in the case shows the existence of any isolated or unusual hole, and this testimony was as consistent with one theory as the other, and does not tend to establish the theory of an isolated or unusual pitfall; and plaintiff's

counsel seem to have relied upon an ability to show a general want of ballast upon the sidetrack in the vicinity of the accident. Hence the jury should not have been permitted to consider this theory.

Upon the other theory, there was proof that went so far as to show that the sidetrack upon which the accident happened was not ballasted to the top of the ties for their whole length, but that, while the dirt covered the tie in the middle of the track, it sloped towards the sides of the track, so that, at the rail, it was from two to four inches below the iron, thus exposing the tie at that point to such depth, and that such was the condition in the vicinity of the accident, and had been since the road was constructed.

This raises the questions: 1. Should the trial court have determined, as matter of law, that this road was in a reasonably good condition? 2. Was the plaintiff in a situation to charge his injury upon defendant?

Adjudications are not wanting upon the subject of the duties of masters in relation to the machinery and places for work furnished to servants; and while a railroad company is required to provide reasonably safe appliances, and keep them in repair, and provide a reasonably safe place ³⁷⁰ for the employee, so as not to expose him to unnecessary danger, it is not within the province of courts or juries to prescribe the manner of using its tracks, or the character of its appliances, by verdicts and judgments which disregard its right to conduct its business in the manner usual with well-managed roads and as good railroading requires. Accordingly, it has been held that a railroad company is under no legal obligation to maintain, for the protection of its employees, a station agent at a flag station where there is an unblocked siding; nor is it bound to change its manner of using brakes, or to adopt the most approved methods or appliances, or to discard what are not the safest known: *Hewitt v. Flint etc. R. R. Co.*, 67 Mich. 61; *Illick v. Flint etc. R. R. Co.*, 67 Mich. 632; *Fort Wayne etc. R. R. Co. v. Gildersleeve*, 33 Mich. 133.

In the case of *Batterson v. Chicago etc. Ry. Co.*, 53 Mich. 125, 128, a brakeman was injured while coupling cars at a place where the ties were raised above the surface of the ground. It was held that—

“The risk of such imperfections was one of the risks of the business. It is not shown or claimed that this track was unsafe for any of the ordinary uses of sidetracks, and the

accident did not arise from any such defect. The lay of the land was such as to be readily seen by anyone who passed along the track at ordinary times. The plaintiff knew that the roadbed there was not ballasted, and was bound to know that there might be irregularities of surface anywhere. The chances of such an accident were not such as to suggest danger as very likely. There was, of course, a probability that cars might have to be coupled at one place as well as another, and sometimes when there was not much daylight. But the company had a right to expect that every brakeman would use reasonable care in examining his footings and surroundings, and we think that they cannot be regarded as at fault for not guarding against an occurrence which was as likely to happen in any place where the ground was uneven, and to completely insure against which would require a sidetrack to be as expensively built as a main track. . . . They had ³⁷¹ a right to rest on the probability that anyone would know what was generally to be seen by his own observation, or by information from those who were on the spot working with him, and who might fairly be expected to do their duty."

The opinion concludes with the following significant language: "There is much reason to regard the accident, from plaintiff's own testimony, as the immediate consequence of his hand slipping from the car, and of nothing else. But we place no stress upon this, because we do not think any case is made out of a violation of duty to the plaintiff on the part of his employers."

In that case the court practically said that a jury should not be permitted to pass upon the question whether a railroad company owed a duty to its employees to ballast its sidetrack where it bordered a pond, asserting that a brakeman ought to expect to be upon his guard against inequalities of surface and uneven places. It will not do to say that this decision was based upon the admitted knowledge of the plaintiff, for the court expressly assert that no duty existed to ballast the track, for the reason that the company had a right to suppose that its employees could and would see the condition of the track, and govern themselves accordingly, entering between the cars only where it was safe.

Gibson v. Erie Ry. Co., 63 N. Y. 449, 452, 20 Am. Rep. 552, is another case involving the same principle. A conductor of a freight train, climbing up the outside of a car, was drawn against the roof of a depot. At the close of the plaintiff's

evidence defendant's counsel moved for a nonsuit upon the ground that no actionable negligence on the part of the defendant had been shown. The court said: "When the deceased entered the employment of the defendant he assumed the usual risks and perils of the service, and also the risks and perils incident to the use of the machinery and property of the defendant as it then ²⁷² was, so far as such risks were apparent. Accepting service with a knowledge of the character and position of the structures from which the employees might be liable to receive injury, he could not call upon the defendant to make alterations to secure greater safety, or, in case of injury from risks which were apparent, he could not call upon his employer for indemnity."

And in the case of *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548, 558, Ellsworth, J., says: "Every manufacturer has a right to choose the machinery to be used in his business, and to conduct that business in the manner most agreeable to himself, provided he does not thereby violate the law of the land. He may select appliances, and run his mill with old or new machinery, just as he may ride in an old or new carriage, or navigate an old or new vessel. . . . The employee, having knowledge of the circumstances, and entering his service for the stipulated reward, cannot complain of the peculiar taste and habits of his employer, nor sue him for damages sustained in, and resulting from, that peculiar service."

In *De Forest v. Jewett*, 88 N. Y. 264, a yard in which the deceased worked was drained by some open ditches running across the road between the ties. He should have seen them and known about them, and it was held that plaintiff could not recover: See also *Sweeney v. Berlin etc. Envelope Co.*, 101 N. Y. 520; 54 Am. Rep. 722.

The case of *Gibson v. Erie Ry. Co.*, 63 N. Y. 449, 20 Am. Rep. 552, has a parallel in the case of *Illick v. Flint etc. R. R. Co.*, 67 Mich. 632. This case is even stronger in its support of defendant's contention. A brakeman was climbing a ladder on the car to set a brake, which had been called for by the engineer. He was in the line of his duty. He was drawn against a bridge, and killed. It was shown that this bridge was narrower than the standard width of bridges in use at the time. The court held as follows: "The bridge was sound and safe for the passage of trains, without defect, and in good repair. Whether it was fourteen or twenty-four feet wide was a matter of no concern to the ²⁷³ brakeman, so long as he

was not required to occupy a place of danger in the discharge of his duties while passing over it, and this he was not required to do. . . . Railroad companies must be allowed to use their own discretion as to the kind of bridges they will use, and when and under what circumstances they will remove or replace them, while they are safe. Any other rule would be both unjust and oppressive. As between the employers and employed, it is unquestionably the duty of a railroad company to provide a track and equipments which shall be reasonably safe; but this does not oblige the company to make use of the latest improvements, or to change the structures upon its road so as to conform to the most recent or advanced improvements and ideas upon such subjects; neither does good railroading require any such thing. . . . I do not think the record discloses any fault or negligence on the part of the defendant."

Mr. Justice Cooley states the doctrine thus: "The terms in which the proposition has been stated will exempt the master from responsibility in all cases where the risks were apparent, and were voluntarily assumed by a person capable of understanding and appreciating them. No employer, by any implied contract, undertakes that his buildings are safe beyond a contingency, or even that they are as safe as those of his neighbors, or that accidents shall not result to those in his service from risks which, perhaps, others would guard against more effectually than it is done by him. Neither can a duty rest upon anyone which can bind him to so extensive a responsibility. There are degrees of safety in buildings which differ in age, construction, and state of repair, as there are also in the different methods of conducting business, and these, not the servant only, but any person doing business with the proprietor, is supposed to inform himself about and keep in mind when he enters upon the premises": Cooley on Torts, 551.

It would seem that we may, from these authorities, deduce the principle that obvious imperfections in methods or machinery, existing at the time of the employment, cannot be made the basis of a liability in favor of an employee who suffers an injury in the course of his ²⁷⁴ employment, for the reason that the employer has a right to have and use imperfect methods and tools, and to ask others to enter his employ to aid him in such use, and that in so doing he does not undertake to insure the employee.

Upon the theory of this case which we are now discussing, we think there was a failure to show negligence on the part of the defendant. The plaintiff was, or ought to have been, familiar with the sidetrack, and, if he was not, common prudence dictated that he should not venture between the moving car and engine without first looking under the car to examine the character of the roadbed, all of which defendant had a right to expect of him: See *Gardner v. Michigan Cent. R. R. Co.*, 58 Mich. 591; *Grand v. Michigan Cent. R. R. Co.*, 83 Mich. 571.

Inseparably connected with this question of negligence is the doctrine that "the employee assumes the ordinary risks and perils incident to his employment." It has been impossible to avoid some discussion of it in the foregoing pages. It is a doctrine as well established as any in the books, that an employee may contract to use defective machinery, and where he knows of the defect, and uses the machinery voluntarily, the law warrants the inference that he assumes the incident risks. It must not be assumed that this doctrine gives unlimited immunity to the master. The doctrine is shaded down to cases where the want of knowledge precludes the inference, and makes the master liable. But this doctrine does not justify carelessness upon the part of the servant. The master has a right to expect him to be alert to inform himself of existing conditions, and he cannot attack the master from the shelter of unjustifiable ignorance of the business, machinery, and methods which he is employed to use. Actual ignorance will not alone suffice to charge a master; the ignorance must also be excusable.

375 The plaintiff says he supposed the road was smooth, and did not know that there were any holes there. He had been for some time in the defendant's employ, passing and repassing the yard and switch in question. It is plain that the condition of this sidetrack could be seen by a casual observer. Self-preservation should have prompted him to look at this track to see whether it was in such condition as to warrant his going between a moving train and engine, though he had never seen the road before. It was in daylight, and he was not encumbered by a lantern. But, relying upon a supposed condition, he tells us he entered, and stepped directly into, the hole between the ties. In addition to the authorities cited, see *Shearman and Redfield on Negligence*, sec. 185; *Foley v. Chicago etc. Ry. Co.*, 48 Mich. 622; 42 Am. Rep. 481;

Piquegno v. Chicago etc. Ry. Co., 52 Mich. 40; 50 Am. Rep. 243; *Hathaway v. Michigan Cent. R. R. Co.*, 51 Mich. 253; 47 Am. Rep. 569; *Michigan Cent. R. R. Co. v. Austin*, 40 Mich. 247; *Viets v. Toledo etc. Ry. Co.*, 55 Mich. 120; *Tuttle v. Detroit etc. Ry. Co.*, 122 U. S. 189, and cases cited.

The jury should have been directed to find a verdict for the defendant.

The judgment will be reversed and a new trial ordered.

LONG and GRANT, JJ., concurred with HOOKER, C. J.

MONTGOMERY, J. This case was once before the court on demurrer to the declaration, and is reported in 91 Michigan 379. It was held on demurrer that while "employees may be chargeable with knowledge that sidetracks are not always perfect, that they are sometimes constructed over ditches or gullies, and are not always ballasted with the same care that main tracks usually are," yet "railroad companies owe it to their employees to protect them from unnecessary and dangerous pitfalls and unusual conditions."

The averment in this declaration was that the railway company permitted a dangerous hole to exist in its track. ²⁷⁶ The case has been tried before a jury, and it appears that the nature of the defect consisted simply of a want of proper ballasting, the only fair inference from the testimony being that while the track was ballasted in the center to the top of the ties, at the outer edge and near the rail it was not filled flush with the ties, but that unfilled spaces to the depth of from two to four inches below the rail were allowed to exist. The accident occurred in the daytime, when the condition of the track was open to the inspection of the plaintiff. The plaintiff had been in the employ of the defendant for at least six weeks, and his duties would take him back and forth past the place of the injury. He must be presumed to have been aware of the apparent condition of the sidetrack, and it was further his duty to use reasonable care in examining his surroundings before attempting to uncouple the car. I think this case falls within the previous adjudications of this court: See *Batterson v. Chicago etc. Ry. Co.*, 53 Mich. 125; *Piquegno v. Chicago etc. Ry. Co.*, 52 Mich. 40; 50 Am. Rep. 243. See also *Shearman and Redfield on Negligence*, sec. 406. The circuit judge should have directed a verdict for the defendant.

Judgment reversed, and a new trial ordered.

MCGRATH, J., concurred with MONTGOMERY, J.

MASTER AND SERVANT—ASSUMPTION OF RISKS—SERVANT'S KNOWLEDGE OF DEFECT.—The principle that a servant cannot recover damage for injuries caused by a defect in the appliances furnished by his employer, when he has knowledge or reasonable means of knowledge of the existence of such defect, is illustrated in the following cases in this series: *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; 77 Am. Dec. 212; *Greenleaf v. Illinois Cent. R. R. Co.*, 29 Iowa, 14; 4 Am. Rep. 181; *Scanlon v. Boston etc. R. R. Co.*, 147 Mass. 484; 9 Am. St. Rep. 733; *Myers v. Hudson Iron Co.*, 150 Mass. 125; 15 Am. St. Rep. 176; *McDonald v. Chicago etc. Ry. Co.*, 41 Minn. 439; 16 Am. St. Rep. 711; *Wormell v. Maine Cent. R. R. Co.*, 79 Me. 397; 1 Am. St. Rep. 321; *Fisk v. Central Pac. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22; *Rolseth v. Smith*, 38 Minn. 14; 8 Am. St. Rep. 637; *Kean v. Detroit etc. Rolling Mills*, 66 Mich. 277; 11 Am. St. Rep. 492; *Nadau v. White River L. Co.*, 76 Wis. 120; 20 Am. St. Rep. 29; *Ell v. Northern Pac. R. R. Co.*, 1 North Dak. 336; 26 Am. St. Rep. 621; *Boss v. Northern Pac. R. R. Co.*, 2 North Dak. 128; 33 Am. St. Rep. 766. For other recent cases to the same point, see *Diehl v. Lehigh Iron Co.*, 140 Pa. St. 487; *Bengston v. Chicago etc. Ry.*, 47 Minn. 486; *Paule v. Florence Min. Co.*, 80 Wis. 350; *Ring v. Missouri Pac. Ry. Co.*, 112 Mo. 220; *Knight v. Cooper*, 36 W. Va. 232; *Johnson v. Chesapeake etc. Ry. Co.*, 36 W. Va. 73; *Young v. Virginia etc. Construction Co.*, 109 N. C. 618; *Gulf etc. Ry. Co. v. Williams*, 72 Tex. 159; *Johnson v. Ashland Water Co.*, 77 Wis. 51; *Tillotson v. Texas etc. Ry. Co.*, 44 La. Ann. 95; *Anderson v. Clark*, 155 Mass. 368; *Lord v. Pueblo etc. Co.*, 12 Col. 390; *Burlington etc. Ry. Co. v. Liehe*, 17 Col. 280; *De Souza v. Stafford Mills*, 155 Mass. 476; *King v. Ford River L. Co.*, 93 Mich. 172. The rule is the same, however dangerous the business may be, and though it may be conducted more safely by the employer: *Fitzgerald v. Connecticut etc. Paper Co.*, 155 Mass. 155; 31 Am. St. Rep. 537; *Hatter v. Illinois C. Ry. Co.*, 69 Miss. 642; but it cannot be shown as a defense to an action by the injured employee that it is the general or universal custom of other masters to furnish defective implements or an unsafe place to work: *Hosie v. Chicago etc. Ry. Co.*, 75 Iowa, 683; 9 Am. St. Rep. 518; *Lake Erie etc. Ry. Co. v. Mugg*, 132 Ind. 168. The general rule was applied in *Wilson v. Winona etc. R. R. Co.*, 37 Minn. 328, 5 Am. St. Rep. 851, to a case where an employee, while coupling cars, caught his foot in a defective frog, and was killed.

CRUMP v. BERDAN.

[97 MICHIGAN, 293.]

NEGOTIABLE INSTRUMENTS TRANSFERRED AS COLLATERAL SECURITY, RIGHTS OF HOLDERS OF.—A *bona fide* holder of commercial paper taken as collateral security for a debt, created either before or at the time of the transfer, is entitled to enforce payment thereof, without regard to equities existing between prior parties of which he has no notice; and when, in an action by such holder to recover upon an instrument thus transferred, the maker's counsel, at the close of the charge to the jury, suggests in a colloquy with the trial judge that the law is otherwise, an omission to correct that suggestion and state the true rule is reversible error.

NEGOTIABLE INSTRUMENTS—STIPULATION TO PAY INTEREST, EFFECT OF.—The negotiable character of a promissory note is not destroyed by the insertion of a stipulation that, if it is not paid when due, the maker will "pay ten per cent interest from date until paid."

ASSUMPSIT.

P. W. Niskern, for the appellants.

Smurthwaite and Higgins, for the defendant.

206 MONTGOMERY, J. Plaintiffs brought suit on two promissory notes, amounting at the time of the trial to one hundred and twelve dollars and fifty cents. The plaintiffs introduced the notes, and rested their case. The defendant then offered testimony tending to show that the notes were given without consideration, and were obtained by a fraud perpetrated by the payee, one S. S. Saunders. The plaintiffs, in rebuttal, gave testimony tending to show that the notes were purchased by them for value, before maturity, in good faith, and without any knowledge on their part of any fraud in the procuring of the notes, or of any failure of consideration. The court, in a very fair and full charge, submitted to the jury the questions of whether there was fraud, and whether the plaintiffs purchased the notes in good faith and for value before maturity. Some criticism is made of the charge upon these points, but it follows so closely the lines of repeated adjudications of this court that it is not desirable to demonstrate its correctness by extended quotations. At the conclusion of the charge, however, the following occurred:

"And before the plaintiffs can be defeated at all, gentlemen, you must find fraud—such fraud practiced by this man Saunders as would have defeated the notes in his hands; secondly, that these plaintiffs had notice of it or knowledge of it before they purchased the notes.

"Mr. Withey, counsel for defendant. Our theory is that they did not buy them; that they received them as collateral.

"The Court. Suppose they were taken as collateral, in good faith?

"Mr. Withey. They were held only as security, and they belonged to this man Saunders all the while. They could not recover them.

"The Court. Now, gentlemen, that is all there is to it. On the law it is a very plain case, and on the facts it presents a question for your solution."

The court not only failed to correct the statement of law by Mr. Withey, but by putting the question as he did in connection with his charge, and permitting the answer 207 of Mr. Withey to stand, allowed the jury to draw the inference that Mr. Withey's statement of the law was correct. As far as

there was any testimony tending to show that the notes were received as collateral, is also tended to show that the plaintiffs parted with value at the time of this receipt. Under these circumstances, certainly, the statement of Mr. Withey was not a correct statement of law: See 1 Daniel on Negotiable Instruments, secs. 820-833; *Railroad Co. v. National Bank*, 102 U. S. 14; and cases cited in note to *Miller v. Finley*, 26 Mich., ann. ed., 249; 12 Am. Rep. 306.

The notes in question each provided for the payment of a certain sum, with interest at seven per cent, and contained the further stipulation: "If not paid when due, I agree to pay ten per cent interest from date until paid." It is contended by the appellee that this introduced an uncertainty as to the amount, and that, therefore, the notes were not negotiable, and that, if this be so, the plaintiffs could not have been damaged by the instructions given. We think there was no such uncertainty as to the amount as to destroy the character of negotiability in the instrument. The precise question is decided in *Hope v. Barker*, 43 Mo. App. 632; and in *Russell v. Klink*, 53 Mich. 161, a note containing a like stipulation was treated by this court as negotiable, although the question was not discussed. There was not wanting the element of certainty in the note. There was no date at which the precise amount due upon the note could not have been determined by an inspection of the instrument itself.

A discussion of the other questions involved would not, we think, be of any material aid in a new trial of the cause.

For the error pointed out the judgment will be reversed, and a new trial ordered.

The other justices concurred.

NEGOTIABLE INSTRUMENTS TRANSFERRED AS COLLATERAL SECURITY, RIGHTS OF HOLDERS OF: See monographic note to *Griggs v. Day*, 32 Am. St. Rep. 712-714. Additional cases to the point that such holders are holders for value are *Berkeley v. Tinsley*, 88 Va. 1001; *Hodges v. Nash*, 141 Ill. 391; *Hill v. Banks*, 61 Conn. 25; *First Nat. Bank v. Adam*, 138 Ill. 489; *Levy v. Ford*, 41 La. Ann. 873; *Brown v. Thompson*, 73 Tex. 58; *Dearman v. Trimmier*, 26 S. C. 506; *Hekner v. Commercial Bank*, 28 Neb. 474.

NEGOTIABLE INSTRUMENTS.—NEGOTIABILITY NOT AFFECTED BY PROVISION OF PAYMENT FOR INTEREST: *Smith v. Crane*, 33 Minn. 144; 53 Am. Rep. 20.

DEWEY v. DETROIT, GRAND HAVEN, AND MILWAUKEE RAILWAY COMPANY.

[97 MICHIGAN, 829.]

RAILROAD COMPANIES—FELLOW-SERVANTS, WHO ARE.—A brakeman and a car inspector, whose duty it is to inspect foreign cars received at a junction for transportation on the company's line, and to see that they are properly loaded and in good condition, are fellow-servants.

RAILROAD COMPANIES—DUTY TO FURNISH SAFE PLACE TO WORK, LIMITS OF.—The duty of a railroad company to furnish its servants with a reasonably safe place to work cannot be extended so as to make it liable for injuries which a brakeman receives through the negligence of a car inspector, in not observing that a car is improperly loaded when it is to be put into a train for transportation.

ACTION to recover damages for personal injuries.

Dickinson, Thurber, and Stevenson, for the appellant.

E. W. Meddaugh, for the defendant.

²³⁰ LONG, J. October 21, 1890, the defendant received at Holly from the Flint and Pere Marquette Railroad Company a car loaded with lumber, for the purpose of transporting it to the Lake Shore and Michigan Southern Junction, in Wayne county, at which point it was to be placed upon the line of the Wabash transfer track. The plaintiff was in the employ of the defendant as a brakeman, and serving on the train in that capacity. He had worked for the company about one year. The train reached the Lake Shore and Michigan Southern Junction about two o'clock in the morning, and the car was run upon the Wabash transfer track. It became necessary to couple the car to ²³¹ a flatcar on the transfer. For the purpose of doing this, the flatcar was backed up by the engine to the loaded car. The plaintiff stepped in between to make the coupling, when his body was caught between the two cars. In his struggle to release himself his right hand and the lower portion of his right arm were crushed between the bumpers and the drawheads of the cars, and so mangled as to necessitate amputation. It appears that the lumber upon the car received at Holly projected at the bottom, at one end, beyond the platform of the car for four or five inches, and a distance upwards of a few tiers only. This projection of lumber decreased the distance between the cars, and by it the plaintiff was caught as the cars came together. He claims to have had no knowledge that this lumber projected until the moment he was caught

by it. It was a dark night, and he claims he could not see, even though he carried a lantern at the time.

The declaration contained five counts. Plaintiff's counsel claim that his demand is founded upon several distinct theories, all involving negligence on the part of the defendant:

1. That he was injured by reason of the defective construction of defendant's flatcar, which allowed the two cars to come so close together that he was caught between them, and, in his alarm and confusion, had his hand and arm caught between the buffers and drawheads.

2. That he was injured by reason of the projection of the lumber beyond the end of the Flint and Pere Marquette car, which, catching his body and forcing him against the end of the flatcar, so hurt and frightened him that, in his struggles to escape, he unconsciously placed his hand and arm in position to be caught and crushed between the buffers and drawheads.

3. That by reason of the combined efforts of the projection of the lumber from the one car, and the improper construction of the other, he was caught and injured.

4. That he was injured by reason of the necessity of passing his hand and arm directly between the faces of ³²² the opposing buffers, because of their being improperly placed in the same horizontal plane with the drawhead upon the flatcar.

Upon the trial in the court below it was admitted that the car was received from the Flint and Pere Marquette Railroad Company, and that, at the time it was so received, defendant had in its employ a person known as "car inspector," whose duty it was to inspect all cars received by defendant at Holly, and to see that they were properly loaded and in good condition. After the arguments had been concluded, the court below remarked, substantially, that the claim that the flatcar was defective in construction passed out of the case, for the reason that such defect, if it existed, was not the proximate cause of the injury. The court directed the verdict in favor of the defendant, on the ground that the car inspector was a fellow-servant with the brakeman, and, inasmuch as it did not appear that the company had not used due care in his selection, it could not be held liable for his negligent inspection, even if he were negligent. The case came to this court on error, and was argued at the April term, 1892, and by a majority reversed, and remanded for a new trial. Subsequently a motion for rehearing was granted, and the case has now been fully argued and further considered by the court.

The writer of this opinion joined in the opinion for reversal, but since the reargument of the case, and a more full consideration of the principles involved, and the consequences attendant upon the rules then laid down, has concluded to revise that opinion, and write for affirmance.

The rule that the master must furnish the servant with a reasonably safe place in which to perform his work has been settled by repeated decisions of this court, and in many late cases: *Van Dusen v. Letellier*, 78 Mich. 492; *Morton v. Detroit etc. R. R. Co.*, 81 Mich. 423; *Roux v. Blodgett etc. Lumber Co.*, 85 Mich. 519; 24 Am. St. Rep. 102. It is also well settled that this duty cannot ^{***} be delegated to another, so as to relieve the master from personal responsibility: *Van Dusen v. Letellier*, 78 Mich. 492; *Morton v. Detroit etc. R. R. Co.*, 81 Mich. 423.

But the real point in controversy here is whether the duty of the master is to be extended so that he may be made liable for the neglect of a car inspector in not observing that a car is improperly loaded when it is to be put into the train for transportation. There is no complaint here about the car itself. It was proper in construction, and a safe car for use in that service. Upon the first argument of the case in this court the real point in controversy was not so fully pointed out and considered as upon the reargument, and the case was regarded as very similar in principle to *Smith v. Flint etc. Ry. Co.*, 46 Mich. 258, 41 Am. Rep. 161, which Mr. Justice McGrath considered as virtually overruled by the later cases cited above. There is, however, a broad distinction between *Smith v. Flint etc. Ry. Co.*, 46 Mich. 258; 41 Am. Rep. 161, and the present case. In the former case, the injury complained of was received by reason of a defect in the framework of the car itself, while here the accident is attributable to improper loading. In the later decisions the doctrine of *Smith v. Flint etc. Ry. Co.*, 46 Mich. 258, 41 Am. Rep. 161, has been doubted, and the rule broadly stated that the master must furnish to the servant a safe place to work and safe appliances to work with. The learned counsel for the defendant does not contend here for the doctrine of *Smith v. Flint etc. Ry. Co.*, 46 Mich. 258, 41 Am. Rep. 161, but does claim that the defendant discharged its full duty to the plaintiff when it furnished safe cars and a competent inspector; that, having done this, it could not be held liable for the negligence of the inspector, as such inspector was a fellow-servant of the plaintiff.

The contention of defendant's counsel in this respect is correct. If a car is out of repair, so that it is in a dangerous condition for use, such fact might not be observed by the ordinary brakeman, but manifest only to a person of skill in that line. There is some reason, therefore, for ³²⁴ holding the company liable, where these circumstances are made to appear, though a competent inspector be furnished, for the master is bound to furnish safe tools and appliances as well as a safe place to work, and cannot delegate the duty of providing them, and thus escape liability. But, in regard to the proper loading of cars, quite a different rule must necessarily prevail. The master must undoubtedly exercise care in the selection of inspectors to see that cars are not improperly loaded or overburdened, so that they are dangerous to employees, but, after this has been done, it cannot be claimed that the master is to be held responsible for the faithful performance of the inspectors' duty. Any other rule than this would make railroad companies insurers of the lives and limbs of employees. In the present case, the projection of the lumber over the end of the car was as apparent to the brakeman, if he had taken the precaution to make observation, as to an inspector. It required no special skill or training to ascertain the fact. The duties of a brakeman are known to be dangerous, and when one enters such service he must be held to have assumed the risks of the employment. He must exercise care of himself in going between moving cars to make couplings.

In an exhaustive opinion by Mr. Justice Brewer in *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368, the doctrine here enunciated is treated, and a like conclusion reached.

A case involving the same principle was before the court of appeals of New York, and decided in 1889: *Ford v. Lake Shore etc. Ry. Co.*, 117 N. Y. 638. It appeared that cars known as "gondola cars," generally used for carrying coal, and which had boxes from eighteen to twenty-four inches high, were loaded with lumber. The company had furnished suitable stakes, which could have been properly fastened inside of the ³²⁵ boxes. Where the ends of the boxes were stationary, one end of the timber was laid down in the bottom of the car, and the other end projected over the end of the box in cases where the timber was longer than the box. The lumber was piled, after it reached the top of the box, so that one piece overlapped another, the pile thus constantly growing

narrower across the top. The cars were loaded under the direction of a foreman of great experience, and, although they were not regular lumber cars, they were much used for carrying lumber for short distances. Plaintiff's intestate, a switchman, was injured by the lumber on one of the cars falling upon him. The cars had been properly inspected, before being sent out, by proper and competent inspectors. It was held that the sole cause of the injury was the improper loading of the car through the failure of the employees to use the stakes furnished by the company, and that those employees were the fellow-servants of the deceased, for whose carelessness the defendant was not responsible.

The same doctrine was also laid down in *Byrnes v. New York etc. R. R. Co.*, 118 N. Y. 251. There the plaintiff's intestate was in defendant's employ as a brakeman. A car loaded with lumber at a way station was to be attached to the train. It was being moved by an engine from the switch to the main track. Plaintiff's intestate got upon it to stop it, but, in consequence of the improper manner in which the car was loaded, the brake was rendered useless, a collision occurred, and he was thrown from the car and killed. In an action to recover damages, it appeared that the car and its appliances, before it was loaded, were in good condition. By the defendant's rules it was made the duty of the station master either to inspect the car himself or have some one do so before it was taken out. Had this been done, the improper loading would have been discovered. It was held that, defendant having provided ^{see} a safe car, and a system and competent man for its inspection, it was not liable for injuries resulting to a co-employee from neglect of their duty. This rule was also laid down in the following cases: *Toledo etc. Ry. Co. v. Black*, 88 Ill. 112; *Louisville etc. R. R. Co. v. Gower*, 85 Tenn. 465; *Northern Cent. Ry. Co. v. Husson*, 101 Pa. St. 1; 47 Am. Rep. 690.

The court below was correct in ruling that the defective condition of the flatcar, if it was defective, had no bearing in the case. The plaintiff's injury was produced by the defective loading, and not by any defect in the car.

The judgment must be affirmed.

HOOVER, C. J., and GRANT, J., concurred with LONG, J.

MONTGOMERY, J. I concur in the result reached by Mr. Justice Long. My reasons are set forth in my opinion on the former hearing.

McGRATH, J., delivered a dissenting opinion in which he referred to a large number of cases decided in Michigan and other states, particularly *Brown v. Gilchrist*, 80 Mich. 56; 20 Am. St. Rep. 496; *Sadowski v. Michigan Car Co.*, 84 Mich. 100; *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 549; 13 Am. Rep. 545; *Bushby v. New York etc. R. R. Co.*, 107 N. Y. 374; 1 Am. St. Rep. 344. In the last of these cases the drop-stakes furnished by a shipper to secure a load of lumber on a flatcar were held to be appliances within the rule which requires a master to furnish his servant with safe instrumentalities for doing the work assigned to him. The learned judge then proceeded as follows:

"The simple question in this case, it seems to me, is whether the obligation of the master includes within its scope the duty of providing cars so loaded that brakemen may perform their duties in respect to them without greatly increased hazard—whether the plaintiff in this case can be said to have been furnished with proper facilities for his work. The duty of inspecting the car itself, and that of the inspection of its condition with its load upon it, have a common origin. Both spring from the duty of protection which the master owes to the servant. There is no ground for saying that one of these duties may be delegated so as to relieve the master from all liability, and that the other may not; nor is there reason in saying that the person who inspects the car itself, its appliances, and instrumentalities, with reference to the safety of those engaged in its transportation, is not a fellow-servant, while he who inspects the loaded car for like purpose, and to see whether it affords proper facilities for the performance of the duties which must necessarily be performed in its transportation, is a fellow-servant. In the present case, both duties were delegated to the same person, both are performed with reference to the same end, and the person to whom delegated must be held in the performance of each to occupy the same relation to plaintiff and defendant. It certainly cannot be said that, with reference to stationed machinery, belting, shafting, and gearing, the master must, at his peril, provide the necessary guards and coverings, and arrange the surroundings so as to render the place reasonably safe, yet, as to a train of cars, between which a brakeman is required, in the ordinary discharge of his duties, to go, while one section is being driven against a standing section or car so loaded as to render the position of the brakeman one of greatly increased hazard to life or limb, the master may, in case of injury, escape liability. The employment is at best a dangerous one. It is as essential to the protection of the brakeman that these spaces be kept clear as that the spaces be provided. This danger can be guarded against."

RAILROAD COMPANIES.—FELLOW-SERVANTS, WHO ARE: See generally notes to *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 31-33, and *Tierney v. Minneapolis etc. R. R. Co.*, 53 Am. Rep. 45. A brakeman and a car inspector were held to be fellow-servants in *Philadelphia etc. R. R. Co. v. Hughes*, 119 Pa. St. 301; *Contra: Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67. Nor are a car inspector and a car coupler fellow-servants: *Tierney v. Minneapolis etc. R. R. Co.*, 53 Minn. 311; 53 Am. Rep. 35.

RAILROAD COMPANIES.—DUTY TO FURNISH SERVANTS WITH SAFE PLACE TO WORK does not extend to the loading of cars, the danger which an employee runs from improper loading being deemed one of the ordinary risks which trainmen assume: *Jacksonville etc. Ry. Co. v. Galvin*, 29 Fla. 636, citing *Toledo etc. Ry. Co. v. Black*, 88 Ill. 112; *Louisville etc. R. R. Co. v. Gower*, 85 Tenn. 465; *Northern Cent. Ry. Co. v. Husson*, 101 Pa. St. 1; 47 Am. Rep. 690; *Day v. Toledo etc. Ry. Co.*, 42 Mich. 523; *Contra: Hough v. Chicago etc. Ry. Co.*, 73 Iowa. 66; *Hamilton v. Des Moines Valley R. R. Co.*, 36 Iowa, 31.

VAN DUSAN v. GRAND TRUNK RAILWAY OF CANADA.

[97 MICHIGAN, 489.]

RAILROAD COMPANIES.—A REGULATION REQUIRING THE PRODUCTION OF A TICKET as evidence of the right to ride is reasonable, and one with which the traveling public is assumed to be familiar.

RAILROAD COMPANIES.—EXPULSION OF PASSENGER FOR NONPRODUCTION OF TICKET.—MEASURE OF DAMAGES.—When the conductor of a train, in taking up one of the coupons of a return ticket, neglects to give the holder a check which, by the regulations of the company, is made the sole evidence of his right to continue his journey beyond a junction station, at which he is to change cars, and, upon the failure of the passenger to produce a check after such change of cars, the second conductor insists on his paying his fare, and in consequence of his refusal to do so, ejects him from the train without unnecessary force, he cannot recover more than the value of the ticket of which he has been wrongfully deprived by the mistake of the first conductor, the evidence showing that he had sufficient money to pay his fare, and actually proceeded to his destination by a later train on the same day.

ACTION on the case for ejection from the defendant's train.

Charles W. Casgrain, for the appellant.

E. W. Meddaugh and L. C. Stanley, for the defendant.

441 **MONTGOMERY, J.** The plaintiff purchased a ticket over the defendant's road from Detroit to Trenton, Canada, and return. This ticket consisted of two parts, each complete in itself—a coupon or ticket from Detroit to Trenton, and a return ticket from Trenton to Detroit. The custom of the company was for the conductor of the train running from Detroit to Port Huron to take up the going portion of the ticket, and give the passenger a check to be used between Port Huron and Trenton as evidence of his right to ride. On reaching Port Huron the plaintiff changed cars, and boarded the regular train from Port Huron to Trenton. On being asked for his ticket by the conductor of this train, it was discovered that he had no check entitling him to ride from Port Huron to Trenton, the only ticket in his possession being the return ticket from Trenton to Detroit. The plaintiff stated that the ticket from Detroit to Trenton had been taken up by the former conductor in charge of the train from Detroit to Port Huron, and no check had been given him. The conductor of the Trenton train stated to the plaintiff that he must have a ticket for the distance covered by his route or the fare in money, and, on the plaintiff's refusal to pay his fare, he was ejected from the train. No unnecessary force was used. The

plaintiff brought this action on the case, and was limited to a recovery of the value of his ticket of which he had been wrongfully deprived by the first conductor.

In this there was no error. The plaintiff, on discovering that the ticket which he had received from the company's agent had been wrongfully taken up by the first conductor without furnishing him the requisite evidence of his right to ride from Port Huron to Trenton, had no ⁴⁴³ right to insist upon riding upon the Trenton train without producing any evidence of his right. To hold otherwise would be to incite unseemly contests. The rule requiring the production of a ticket as evidence of the right to ride is reasonable, and is one with which it must be assumed the traveling public is familiar. In the present case the failure of the former conductor to furnish plaintiff a check was evidently a mistake, and the plaintiff, without discovering the mistake, had taken his seat in the train from Port Huron to Trenton, he at the time not possessing any evidence of his right to ride. Upon discovering this mistake, his remedy was not by insisting upon a further breach of duty or of the rules of the company by the conductor in charge of the Trenton train. On the contrary, it was his duty to leave the train peaceably or pay his fare, and to seek his remedy for damages resulting from either necessity as the situation at the time required. But the evidence shows that he had the money with which to pay his fare, and did so, and proceeded by a later train after being ejected. As he was not entitled to ride upon the train in question, it is apparent that the damages which he suffered by the fault of the first conductor are covered by a recovery of the amount of fare which he was compelled by his fault to pay. The ruling of the trial judge, in accordance with the views herein expressed, is fully sustained by the former rulings of this court: *Frederick v. Marquette etc. R. R. Co.*, 37 Mich. 342; 26 Am. Rep. 531; *Mahoney v. Detroit Street Ry. Co.*, 93 Mich. 612; 32 Am. St. Rep. 528; *Thomas v. Chicago etc. Ry. Co.*, 72 Mich. 355; *Heffron v. Detroit City Ry. Co.*, 92 Mich. 406; 31 Am. St. Rep. 601.

The case is not one where the ticket on its face was apparently good, and where it was so understood by the passenger, as was the case in *Hufford v. Grand Rapids etc. R. R. Co.*, 53 Mich. 121; 64 Mich. 631; 8 Am. St. Rep. 859. On the contrary, in the present case no ticket was produced between Port Huron and Trenton. It was argued that as the plaintiff

had the ⁴⁴⁵ return coupon, the conductor should have accepted his statement that the original ticket had been taken up; but, apart from the fact that this is not the evidence required by the rules of the company, it is apparent that the evidence afforded by the possession of the coupon would not be conclusive. For aught that then appeared to the conductor, another passenger on the same train may have used the check between these two points before the return coupon was presented to him.

The judgment will be affirmed, with costs.

HOOKEK, C. J., LONG and GRANT, JJ., concurred. McGRATH, J., did not sit.

In *Rouser v. North Park Street Ry. Co.*, 97 Mich. 565, an analogous question was presented to the same court. There it appeared that under existing contracts between two street railway companies the payment of a single fare entitled passengers to a continuous ride over both lines. The tickets issued consisted of two coupons, separated by a perforated line, each coupon designed to be taken by the conductor of the proper road. Each coupon had the following printed upon it: "V. C. St. & C. Ry. Co. A. J. Bonne, Pres't." Upon the lower were the words: "City Hall to North Park Ry. Depot." Upon the upper were the words: "North Park Ry. Depot to North Park." The plaintiff boarded one of the cars of the Valley City Street and Cable Railway Company, the conductor of which took his ticket, and so negligently tore the coupons apart that the words upon the upper one, which showed the limits of the trip permissible on the defendant's line, were left upon a fragment attached to the lower one. The conductor of the defendant's car refused to accept the coupon in this mutilated condition, and required the plaintiff to get off, which he did, although he had money and might have paid his fare had he been so disposed. Upon these facts the supreme court affirmed a judgment of the circuit court for the plaintiff, giving him one dollar damages. Hooker, C. J., made the following remarks: "They [the tickets] were of peculiar color and print, and susceptible of easy recognition. A conductor should have no difficulty in identifying a fragment as a portion of such ticket, with the office and use of which he must be supposed to be familiar. After inspecting the tickets we have no hesitation in saying, as matter of law, that the conductor was bound to know that the fragment was a portion of a genuine ticket used upon his line, which, if whole, would have entitled the plaintiff to a ride. It was evidence that some one had paid a fare. It is said that the conductor was not obliged to take this because it was mutilated; that it did not show the destination, and that to require it would subject the defendant to the danger of having fractions of tickets used fraudulently. We think, however, that there was no reason for the belief that the other part had been or could be used illegally. When the upper portion of the coupon was produced by a passenger, the natural inference would be that the mutilation was the result of carelessness. The absence of the upper half would be a different matter, and could be accounted for in no such way. . . . Neither could there be any uncertainty about the destination, as such tickets covered the whole length of the road between the points named."

RAILROAD COMPANIES.—REGULATION REQUIRING PRODUCTION OF TICKETS WHEN DEMANDED is reasonable: *Illinois Cent. R. R. Co. v. Whittemore*, 43 Ill. 420; 92 Am. Dec. 138; *Pooler v. Northern Pac. R. R. Co.*, 16 Or. 261; 8 Am. St. Rep. 289. A passenger who has once surrendered his ticket at the request of the company's servant cannot be required either to produce the ticket when again called upon for it or to pay fare as a condition of remaining on the train: *Georgia R. R. etc. Co. v. Eekew*, 86 Ga. 641; 22 Am. St. Rep. 490. So, too, a passenger holding the wrong end of a round-trip ticket, returned to him by the conductor's mistake, and giving a reasonable explanation of the mistake, is entitled to be carried according to the real contract; and a regulation making the ticket the only evidence of his right to travel on the train is unreasonable: *Kansas City etc. R. R. Co. v. Riley*, 68 Miss. 765, 24 Am. St. Rep. 309. On the other hand, it was held in *Torton v. Milwaukee etc. Ry. Co.*, 54 Wis. 234, 41 Am. Rep. 23, that if a passenger asks a conductor for a stopover ticket, and by his mistake receives only a trip check, the second conductor may lawfully eject him for nonpayment of fare. So, too, if one enters a train, mistakenly believing that he has in his possession a ticket issued by another company, which, according to a custom of the company operating the train in question, would be accepted for passage thereon, he may be compelled to pay his fare or leave the train: *Ham v. Delaware etc. Canal Co.*, 142 Pa. St. 617. In *Townsend v. New York Cent. etc. R. R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419, the facts were very similar to those in the principal case, and a like decision was rendered.

RAILROAD COMPANIES.—DAMAGES RECOVERABLE FOR WRONGFUL EXPULSION.—In *Georgia R. R. etc. Co. v. Dougherty*, 86 Ga. 744, 22 Am. St. Rep. 499, a passenger who received a wrong ticket through the mistake of the ticket agent, and, having no money to pay his fare, was ejected from the train, was allowed vindictive damages. Under ordinary circumstances the measure of damages for a wrongful expulsion, without needless violence or insult, and from which no bodily injury results, is the cost of a ticket to the passenger's destination, together with an allowance for such damages as actually result from loss of time: *Gorman v. Southern Pac. Co.*, 97 Cal. 1; 33 Am. St. Rep. 157.

LA DUKE v. TOWNSHIP OF EXETER.

[97 MICHIGAN, 450.]

NEGLECTANCE.—PROXIMATE AND REMOTE CAUSE.—The negligence of a township in failing to keep one of its bridges in repair is the proximate cause of injuries received by a traveler in attempting to control the struggles of his horse after it has caught its feet in a hole in such bridge.

DAMAGES FOR PERMANENT INJURY, UNDER WHAT ALLEGATIONS RECOVERABLE.—A declaration which expressly says that a horse was greatly injured and damaged, and became sick, bruised, etc., and so remained for a long space of time, during which the plaintiff was put to great expense in taking care of the animal, and was deprived of its use, permits the recovery of damages for the permanent injury to such horse, as well as the value of his services while disabled.

NEGLECTANCE.—DECLARATION, WHEN SUFFICIENT TO SUPPORT VERDICT FOR PLAINTIFF.—An allegation in a complaint in an action to recover damages for personal injuries caused by the struggles of a horse whose feet

were caught in a hole in a bridge is sufficient to support a verdict for injury to plaintiff's left arm and shoulder, when it states that he has lost the use of that arm and shoulder, and is permanently disabled in the same, although it does not appear that the arm or wrist was broken, or the shoulder dislocated, as is averred in another count.

EVIDENCE—HEARSAY TESTIMONY, WHAT IS.—In an action to recover damages for personal injuries, evidence of what the plaintiff said in regard to the hurt some time after the accident is not admissible to prove such hurt, but the admission of such evidence is not reversible error if the plaintiff has previously testified to the same injury, and his statements have not been contradicted.

TOWNS—NOTICE OF DEFECT IN BRIDGE, EVIDENCE ADMISSIBLE TO SHOW. A charge that proximity of residence on the part of the highway commissioner is a circumstance tending to show notice of a defect in a town bridge is unobjectionable.

ACTION to recover damages for personal injuries.

C. A. Golden and George M. Landon, for the appellant.

I. R. Grosvenor, for the plaintiff.

⁴⁵¹ **HOOKE**, C. J. One of the plaintiff's horses caught his ⁴⁵² hind foot in a hole in defendant's bridge, and, while struggling to free himself, got the other hind foot in also, and fell upon his knees. The plaintiff sent his wife for help, and attempted to hold the horses until assistance should arrive, to prevent injury to the imprisoned horse by his struggles or by his mate. While so engaged plaintiff was injured by the struggles of the horse.

It is contended by defendant's counsel that the negligence of the township in failing to keep its bridge in repair was not the proximate cause of the injury. We think otherwise, as was held in two cases cited by counsel for plaintiff on all fours with this: *Page v. Bucksport*, 64 Me. 51; 18 Am. Rep. 289; *Stickney v. Town of Maidstone*, 30 Vt. 788.

Error is assigned upon the admission of testimony and the charge, which are said to have allowed the jury to give damages for a permanent injury to the horse. There was testimony showing that the horse was injured to the extent of thirty dollars, but we find no exception in the record. The declaration alleged:

"By means whereof, also, the said horse was greatly injured and damaged, and became sick, bruised, lame, and injured, and so remained for a long space of time, to wit, for the space of two months thence, hitherto, during which time said plaintiff was put to great cost and expense in taking proper care of and in purchasing medicines, in a large sum of money, to wit, fifty dollars, and was deprived of the use of

said horse for all that time, to wit, two months, to the loss and damage of said plaintiff in the sum of twenty-five dollars."

This expressly says that the horse was greatly injured and damaged. This would have, permitted the recovery of damages for the permanent injury to the horse, as well as for the value of his services while disabled.

The testimony showed that plaintiff was injured in his arm and shoulder by the struggles of the horse. The third count of the declaration contains the following language:

"The said plaintiff . . . was injured by the ⁴⁵³ struggling of said horse to get out as aforesaid, by means of which he became bruised, sick, lame, disordered, and permanently injured and disabled in his left arm and shoulder, so that he was confined in his home, under the care of a physician, for a long time, to wit, for the space of six weeks, and suffered great pain, and was unable to attend to his accustomed business during all that time, and paid and expended a large sum of money for his care, medical attendance, and medicines, to wit, the sum of one hundred dollars, and has lost the use of his said arm and shoulder, and is permanently disabled in the same."

We think this sufficient to support a verdict for injury to the left arm and shoulder, although it did not appear that the arm or wrist was broken, or the shoulder dislocated, as alleged in another count.

The charge of the court that proximity of residence on the part of the highway commissioner was evidence tending to show notice to the defendant was unobjectionable.

But one other question need be noticed. Plaintiff's wife testified that after the horse was extricated, and the plaintiff had hitched up and started to drive home, he said to her that the horse had hurt his arm, and that he could not hold the lines in his hands. We think this is hearsay. It did not occur at the time of the injury, but some time after; hence it was not a part of the *res gestæ*: *People v. Newton*, 96 Mich. 586. Nor can it be considered an expression of pain or anguish. It states a circumstance, and was admitted to prove the hurt. It reinforced the plaintiff's testimony by the fact that he mentioned it soon after the accident. But the plaintiff had himself testified to the same injury, and was nowhere disputed; hence, under the evidence, the jury could not properly have found otherwise, and the error did not injure the defendant: See *Tillotson v. Webber*, 96 Mich. 144, 150.

We find no prejudicial error in the record, and the judgment must be affirmed.

The other justices concurred.

NEGLIGENCE.—PROXIMATE CAUSE: See the extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807-861, especially page 836, where reference is made to notes in the present series, in which a number of cases dealing with this subject in connection with accidents on highways are cited.

MUNICIPAL CORPORATIONS—NOTICE OF DEFECT, WHEN INFERRED.—Notice to a city councilman of a defect in a street is notice to the city, although he was not at the time engaged in any official duty: *Logansport v. Justice*, 74 Ind. 378; 39 Am. Rep. 79.

PEOPLE v. ABBOTT.

[97 MICHIGAN, 484.]

RAPE—EVIDENCE OF INTERCOURSE WITH OTHER MEN TO IMPEACH CREDIBILITY OF PROSECUTRIX.—In a prosecution for rape upon a girl under the age of fourteen years, evidence that at other times prior to the alleged offense she had had sexual intercourse with other men is not competent for the purpose of impeaching her credibility.

RAPE—EVIDENCE ADMISSIBLE TO SHOW RELATIONS OF THE DEFENDANT WITH PROSECUTRIX.—In a prosecution for rape upon a girl under the age of fourteen years, evidence that the defendant had had intercourse with her prior to the date of the offense charged is admissible, not for the purpose of making it more probable that the crime was committed, but for the purpose of showing the relations of the parties, and the opportunity offered the defendant of meeting her.

RAPE—WITNESSES FOR THE DEFENSE, CREDIBILITY OF, HOW IMPEACHABLE.—In a prosecution for rape the state has a right to impeach the defendant's witnesses for truth and veracity, but to allow a question as to their reputation in that regard to be coupled with an inquiry into their reputation for chastity is reversible error, even though the court cautions the jury that only the testimony relating to their truth and veracity is to be considered.

RAPE, CONVICTION FOR LESSER OFFENSES IN PROSECUTION FOR.—An information for rape necessarily embraces the offense of an assault with intent to commit rape and an assault and battery, and it is therefore error for the court to charge the jury that the defendant in a prosecution for rape must be convicted of that crime, if at all. The jury, in such a case, should be told what constitutes the lesser offenses, and instructed that they may convict the defendant on either of them.

PROSECUTION for rape upon a girl under fourteen years of age.

Nathan P. Allen, for the respondent.

A. A. Ellis, attorney-general, and *Alfred Wolcott*, prosecuting attorney, for the people.

⁴⁸⁵ LONG, J. Respondent was convicted of the crime of rape upon one Annie Punderson, a girl of ten years, in the superior court of Grand Rapids.

Several errors are assigned.

1. That the court erred in excluding the testimony of the girl, Annie Punderson, as to her having had carnal intercourse with other men prior to the time of the alleged offense.

The statute provides: "If any person shall ravish and carnally know any female of the age of fourteen years or more, by force and against her will, or shall unlawfully and carnally know and abuse any female child under the age of fourteen years, he shall be punished by imprisonment in the state prison for life or for any term of years; and such carnal knowledge shall be deemed complete upon proof of penetration only."

In *People v. Glover*, 71 Mich. 303, the case was brought under this statute, and error was alleged upon the refusal of the court to allow the respondent to show that the reputation of the girl for chastity was bad. It was held that the statute having fixed the age of consent at fourteen years, it would be no answer to the charge that she had a bad reputation for chastity. The ruling of the court in the present case excluded the inquiry as to whether she had had sexual intercourse with other men prior to that time, and was correct for the reasons given in *People v. Glover*, 71 Mich. 303. The offense is in unlawfully and carnally knowing a female child under the age of fourteen years, and it is no less an offense within the terms of the statute, if the child has had intercourse with other men prior to that ⁴⁸⁶ time. The court was not in error in excluding the evidence.

But though the court did exclude, at the time it was first offered, evidence of this character, it was afterwards admitted, and respondent's counsel drew from the girl the fact that at other times prior to the alleged offense, she had had intercourse with several other men. The court admitted this testimony on the claim of counsel for respondent that it was competent as bearing upon the girl's credibility. It was not competent in this case, even for that purpose. If the girl had been of the age of consent, it might be competent to admit evidence of her general reputation for chastity, as bearing upon the probability of her story, but specific acts of unchastity could not be inquired into: *People v. McLean*, 71 Mich. 309; 15 Am. St. Rep. 263. But here the law conclusively

presumes that the girl could not give her consent, and every act of intercourse with her would be a crime committed against her, and such acts could not therefore, affect her credibility. Her reputation for truth and veracity could be inquired into, the same as an adult, but she could not be impeached by her acts of intercourse.

2. It is claimed that the court was in error in allowing the girl to state that the respondent had had intercourse with her prior to the date of the offense charged. There was no error in this. While such testimony was not admissible for the purpose of making it more probable that the offense charged had been committed, yet it was admissible for the purpose of showing the relations of the parties, and the opportunity offered the respondent of meeting her. In *Strang v. People*, 24 Mich. 6, the prosecutrix was permitted, though above the age of consent, to testify to another act of intercourse with her by respondent. The court there said it was admissible for the purpose of explaining to some extent the fear the witness was under, and as tending ⁴⁸⁷ to account for her submission to his will at the time of the assault charged; and that the court below, in submitting the case to the jury, correctly instructed them that they were to regard it for that purpose only. In the present case the court instructed the jury that they must ignore every other offense testified to, except the one charged in the information, and that this testimony was admitted for the purpose only of showing the relations of respondent with her, and his opportunity to have had connection with her on the occasion when the offense is charged to have been committed, and that what he may have done before, he is not to be charged with in this prosecution.

3. It is charged that the court erred in permitting the prosecutor to ask one of the witnesses for the people, who was called on rebuttal, what the reputation of Mrs. Van was for morality, decency, virtue, truth, and veracity in that neighborhood; and the same question was asked in reference to Evelyn Merty and Mary Gardner, with the permission of the court. These parties had been called as witnesses for the defense, and the question was asked for the purpose of impeaching them. The witness answered that the reputation of these parties was bad. The court attempted to correct the admission of these questions by saying in the charge to the jury that, in considering the question of the impeachment of these witnesses, they should leave out that part of the questions

and answers which related to their reputation for morality, decency, and virtue, and consider only that portion relating to their truth and veracity. In permitting these questions to be answered there was manifest error, and the attempt to cure it in the charge does not remove the effect it probably had on the jury. The prosecution had the right to impeach the witnesses for truth and veracity, but, when with the question there was coupled an inquiry into their reputation for chastity, the question should have been excluded: *Leonard v. Pope*, 27 Mich. 145; *People v. Whitson*, 43 Mich. 419; *People v. Mills*, 94 Mich. 630. The answer was before the jury, and it is impossible to say that it did not have weight with them in considering the testimony of these witnesses, notwithstanding the caution of the court: *Scripps v. Reilly*, 35 Mich. 371; 24 Am. Rep. 575.

4. The court also erred in instructing the jury that they must convict the respondent of rape, if at all. The information for rape necessarily embraced the offense of an assault with intent to commit the crime of rape, and an assault and battery, and the jury should have been instructed that they might convict him of either of the lesser offenses. Howell's Statutes, section 9428, provides: "Upon an indictment for any offense consisting of different degrees, as prescribed in this title, the jury may find the accused not guilty of the offense in the degree charged in the indictment, and may find such accused person guilty of any degree of such offense inferior to that charged in the indictment, or of an attempt to commit such offense."

In *People v. McDonald*, 9 Mich. 150, 153, it was said: "It is a general rule of criminal law that a jury may acquit of the principal charge, and find the prisoner guilty of an offense of lesser grade, if contained within it." See also *Hanna v. People*, 19 Mich. 316, to the same effect, and in which the provision of the statute above quoted was cited.

It was settled in *Campbell v. People*, 84 Mich. 351, that under an information charging rape it is competent to find the respondent guilty of an assault with intent to ravish. The same doctrine was followed in *Hall v. People*, 47 Mich. 636. In the latter case it was said: "We are also of the opinion that the court erred in not instructing the jury that they might convict the accused of a felonious assault under the offense charged."

It was held in *People v. Courier*, 79 Mich. 366, that, *420*

under an information charging carnal knowledge and abuse of a female child under the age of fourteen years, the accused may be convicted of an assault with intent to commit that offense, or of simple assault.

In this case it was a question for the jury, under the evidence in the case, to determine whether the respondent was guilty of rape, of assault with intent to commit that crime, or of simple assault; and the court should have directed them what constitutes the lesser offenses, and that they might convict on either of these lesser offenses: *Hall v. People*, 47 Mich. 636.

For these errors the judgment must be set aside, and a new trial awarded.

The other justices concurred.

RAPE.—CARNAL KNOWLEDGE OF YOUNG CHILDREN: See, generally, note to *Smith v. State*, 80 Am. Dec. 374, where several cases to the point that the consent of the female is no defense to a prosecution under the statutes which declare sexual intercourse with females under a certain age to be a rape under all circumstances. To the same effect, see *Rodgers v. State*, 30 Tex. App. 510; *People v. Goulette*, 82 Mich. 36.

RAPE.—PROSECUTRIX CANNOT BE IMPEACHED by evidence of the bad character of her parents: *State v. Anderson*, 19 Mo. 241.

RAPE.—EVIDENCE OF PREVIOUS SEXUAL CONNECTION OF THE PROSECUTRIX WITH THE ACCUSED, WHEN COMPETENT: See cases cited in the note to *Smith v. State*, 80 Am. Dec. 369.

RAPE, DEFENDANT CHARGED WITH, WHEN MAY BE CONVICTED OF ASSAULT WITH INTENT TO RAVISH: *State v. Cross*, 12 Iowa, 66; 79 Am. Dec. 519. On an indictment for rape, it is not error to instruct the jury that, if they are satisfied beyond a reasonable doubt that the defendant committed an assault upon the woman with intent to commit rape, they may convict of an assault: *State v. Bagan*, 41 Minn. 285; *Glover v. Commonwealth*, 86 Va. 382. A verdict finding the defendant guilty of assault will not be reversed on the ground that the evidence shows that he was guilty of rape or nothing: *Pratt v. State*, 51 Ark. 167. But, if the evidence shows the crime of rape to have been consummated, the court is not required to charge the jury on the minor offense: *Berry v. State*, 87 Ga. 579.

HANN v. NATIONAL UNION.

[97 MICHIGAN, 512.]

INSURANCE—REPRESENTATION AS TO GOOD HEALTH, EFFECT OF.—If a benefit certificate is granted upon the express condition that the statements in the application therefor are true, but the applicant, while affirming himself to be in good health, also makes a general declaration as to the statements subscribed by him, that they are true to the best of his knowledge and belief, the effect of this qualification is that recovery upon the certificate can be defeated only by showing that he knew or had reason to believe that he was not in good health at the time the application was made.

INSURANCE—GOOD HEALTH, MEANING OF.—The term good health, when used in an application for a policy of life insurance, means that the applicant has no grave, important, or serious disease, and is free from any ailment that seriously affects the general soundness and healthfulness of the system. A mere temporary indisposition which does not tend to weaken or undermine the constitution at the time of taking membership does not render a policy void.

INSURANCE—CONCEALMENT OF WHAT FACTS WILL NOT AVOID POLICY.—The failure of the applicant for a life insurance policy to disclose to the company the fact of his having consulted a physician on the same day that he applied for his policy is not such a concealment as will vitiate the contract, where the evidence shows his object in consulting the physician was merely to procure a prescription to relieve him from a slight disorder of the stomach, which soon passed away.

APPEAL—REFUSAL TO INSTRUCT AS TO TESTIMONY, WHEN NOT ERROR.—It is not reversible error to refuse an instruction as to the legal effect of testimony upon which no claim is founded.

ASSUMPSIT.

Stuart and Knappen, for the appellant.

Smiley, Smith, and Stevens, for the plaintiff.

514 LONG, J. This is an action of *assumpsit*, brought upon a benefit certificate for three thousand dollars, issued by the defendant, a fraternal and beneficiary order, having its main office at Toledo, Ohio, with subordinate lodges in different cities, to one B. B. Hann, and payable in case of his death to his mother, the plaintiff. Application for membership was made by B. B. Hann, August 13, 1891. He was examined by the medical examiner September 18th, and the certificate was issued of the date of September 24th. He died October 28, 1891, of cerebral meningitis. Payment was resisted by the defendant upon the claim that B. B. Hann was not in good health when he made application for membership, nor when he was granted the certificate. The case was tried in the circuit court before a jury, who returned a verdict in

favor of the plaintiff for the full amount of the certificate, with interest. The errors complained of relate entirely to the charge of the court and the refusal of the court to give certain requests of the defendant.

The application for the insurance was in writing, addressed to the officers and members of the Grand Rapids ⁵¹⁵ Council, No. 32, located at Grand Rapids, this state, and stated, among other things:

"I do declare upon my honor as a man that the statements by me subscribed herein are each and every one of them true, to the best of my knowledge and belief. . . . I am temperate in my habits, and have no injury or disease which will tend to shorten my life. Am now in good health, and am able to gain a livelihood."

It also contained the further statement: "I do hereby consent and agree that any untrue or fraudulent statement made above or to the medical examiner, or any concealment of facts by me in this application, or my suspension or expulsion from or voluntarily severing my connection with the order, shall forfeit the rights of myself and my family or beneficiary to all benefits and privileges therein."

After the application was made, he presented himself to the medical examiner, who filled out a blank prepared for that purpose, giving answers to questions therein set forth. Among such was asked:

"Is there anything, to your knowledge or belief, in your physical condition, family or personal history, or habits, tending to shorten your life, which is not distinctly set forth above?"

Answer: "No."

The benefit certificate contained the following provision:

"This certificate is granted upon the express condition that all statements and representations made by said member in his application for membership in said council, and all statements made to the medical examiner by him, are true."

The certificate also contained the further provision:

"The application of the member, a copy of which is hereto attached, is hereby made a part of this certificate."

It was claimed upon the trial by defendant that, at the time the application was made and the certificate issued, Mr. Hann was afflicted with the disease from which he subsequently ⁵¹⁶ died, and that, at the time of the application and medical examination, he concealed from the council and medical examiner that he was afflicted with any disease. It

was further contended that the statement made in the application, "I am now in good health," means a warranty that he was in good health, and that, if he was not in good health, he could not recover.

The court, in its charge, among other things, stated to the jury:

"1. If, upon consideration of the whole case—the whole evidence in the case—you find that at the time this contract of insurance was made—at the time the application was made and certificate issued—B. B. Hann was not in good health (within the meaning of that term, the proper meaning of it, as I shall explain it to you later), or that he fraudulently concealed his condition in regard to his health, and was not, in fact, in good health, then the policy is void; otherwise not."

"2. By the foregoing terms of the policy and application, the parties agreed that the truthfulness of the applicant's answer to the questions propounded should be the basis upon which the validity of the policy should stand. If true, the policy should be a valid one; if untrue, the policy should have no force as a contract. Hence, if you find any statement in the policy or application untrue, concerning which an issue is raised in this action, or any concealment of facts as to the applicant's condition in respect thereto, the policy is void, and the plaintiff cannot recover.

"3. By the terms of the policy and application, above recited, the applicant assumed the whole risk of the consequences if his answers turned out untrue.

"4. The question as to the health of the applicant is a preliminary one to ascertain if he is an insurable subject. Hence, if you find that B. B. Hann, when he made the application on August 13, or at any time prior to the issuing of the policy, on September 24, 1891, was not in good health (within the meaning of the term, as I shall presently define it), then the policy is void, and the plaintiff cannot recover.

"5. If you find that, either on August 13th, or at any time prior to September 24th, said B. B. Hann was afflicted with cerebral meningitis, the disease of which he died, then the policy is void, and the plaintiff cannot recover.

517 "6. The statements above mentioned, as recited in the policy and application, upon the truth of which the validity of the policy depends, are called 'warranties,' and must be strictly true; but, when there is no warranty, an untrue

allegation of a material fact, or a concealment of a material fact, will avoid the policy.

"7. The words 'I am now in good health,' occurring in Hann's application, amount to a warranty or representation that he was in good health at the time, and, if he was not in good health, the plaintiff cannot recover."

It is claimed that the court was in error in omitting from the fifth statement above set forth that portion of defendant's request reading as follows:

"It is wholly immaterial whether the applicant knew of the existence of this disease or not. He has stated that he was in good health, and he assumed the whole risk of his answer being untrue."

Defendant has no reason to complain that this request was not given, and still less of the charge, as given, upon this branch of the case. The jury was repeatedly charged that the validity of the policy depended upon the fact of the applicant's health being good, and that the statements made in the application amounted to a warranty; and, in giving this interpretation, the court entirely ignored a very important factor in the application. While it is undoubtedly true that warranties must be literally fulfilled or the applicant can derive no benefit from the policy, and with respect to the compliance with warranties, there is no latitude, no equity, and the only question is, is the thing warranted true?—if not, the insurer is not answerable for any loss (Bliss on Insurance, sec. 88), yet here the application, which is made a part of the benefit certificate while stating that the applicant is in good health, also states that he declares upon his honor as a man that the statements subscribed are each of them true, "to the best of my knowledge and belief." This was a qualification to which the court did not call the attention of the jury, and which ⁵¹⁸ is disregarded in the request to charge which the court refused, and upon which error is assigned. It cannot be said under such a statement that the applicant assumed, or attempted to assume, the whole risk of his answer being true. It is a statement that he believed he was in good health, and, to the best of his knowledge, his statement was true. It was therefore material whether the applicant knew of the existence of the disease or not. The court, by its charge, instead of putting the case to the jury in this light, directed that the applicant assumed the whole risk of the consequences if his answer turned out to be untrue.

In *Powers v. North Eastern Mut. Life Assn.*, 50 Vt. 630, the jury found specially that the assured had disease of the heart at the time the application was made, but that he did not know it, and might not reasonably have been expected to know it. In the application, which was made a part of the policy, he was asked the question whether he then had or had had disease of the heart, and answered, "No." The application contained the same stipulation as the one in suit here—that it should form the basis of the contract, and be a warranty, and, if any statement should be found untrue, the policy should be void. It was said by the court: "If he had answered that he had no knowledge that the disease existed, the finding of the jury might affect the result."

So in the present case, if the statement had been made without this qualification, the defendant undoubtedly would have been entitled to the charge that "it is wholly immaterial whether the applicant knew of the existence of the disease or not." If Hann's statement may be considered as amounting to a warranty at all, it is nothing more than a warranty that, so far as his information and knowledge extended, he was in good health. Under such warranty or mere representation, whichever it may be ⁵¹⁹ called, in order to defeat recovery upon the policy, it would be necessary to show that the applicant knew or had reason to believe that he was not in good health at the time the application was made.

It is also contended that the court was in error in omitting from the thirteenth request to charge the following words: "It is immaterial that the disease may have been in its first stages, and that B. B. Hann did not know that he had such disease. If the disease was present the plaintiff cannot recover."

It was said of this that the applicant's answer recited that there was not the beginning of disease in his system, and that no disease was present in his system. The court directed the jury that if, at the time of taking out the insurance, the applicant "had a disease which afterwards caused his death, that was a grave, important, and serious disease, and it would be immaterial that it may have been in its first stages, or that Hann did not look upon it at the time as of any consequence. If it was, in fact, of consequence, then the plaintiff cannot recover."

And, again, the court stated: "If he had the disease at the
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time [he made his application and joined the order] the plaintiff cannot recover."

The court also instructed the jury as to the meaning of the term "good health" as follows:

"Good health means that he had no grave, important, or serious disease. . . . It means a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously, and not a mere indisposition, which does not tend to weaken or undermine the constitution of the assured. A mere temporary ailment or indisposition, which does not tend to weaken or undermine the constitution at the time of taking membership, does not render a policy void."

This charge was but following the language of this court 520 in *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, 8 Am. St. Rep. 894, and *Pudritzky v. Knights of Honor*, 76 Mich. 428.

Error is also assigned upon the refusal of the court to give defendant's fifth request to charge, viz: "In this case it is proved and conceded that a physician was consulted and prescribed for B. B. Hann just prior to and on the same day he made his application for the insurance in question herein, and that fact ought to have been disclosed to the defendant company, for insurance is a contract *uberrimæ fidei*, and is avoided by the suppression of any facts or circumstances which may assist the insurer in forming a correct judgment."

It was contended upon the part of the plaintiff that the call of B. B. Hann upon a physician was for a prescription to relieve him from a slight disorder of the stomach, which was quickly relieved. Under the testimony in the case, the court could not have determined, as matter of law, that the applicant should have disclosed this to the company, and that, not doing so, the policy was void, and properly refused the request. It was at least a question for the jury. As was said in *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 313, 8 Am. St. Rep. 898: "A mere calling into a doctor's office for some medicine to relieve a temporary indisposition, not serious in its nature, could not be considered an attendance by a physician, within the meaning of the question [whether he had had a serious illness], . . . but such attendance must have been for some disease or ailment of importance."

The court instructed the jury that, if the applicant concealed his condition in regard to his health, and was not, in

fact, in good health, the policy was void; and, again, that, if the jury found that there had been any concealment of facts as to the applicant's condition in respect to his health, the policy was void.

Some question is here made that the applicant did not state his true place of residence in the application. He stated in his application that his place of residence was in Grand Rapids, and that he had resided there for eighteen years. ⁵³¹ After the proofs were closed, the defendant contended that they tended to show that his place of residence was in Kansas during a part of that time; and the court was requested to charge that, if the jury found this to be true, the policy was void. The request was refused, and, as plaintiff's counsel now contend, properly, for the reasons:

1. Because the defendant had given no notice of such a defense.

2. Because there was no sufficient evidence on the subject to leave the question to the jury.

We think plaintiff's counsel right in both these claims. If such defense was relied upon, notice should have been given under Circuit Court Rule No. 104. We think the case settled by the decision in *Home Ins. Co. v. Curtis*, 32 Mich. 402. After the testimony was closed, and for the first time, this question was raised by the request to charge. This being refused, defendant sought to amend its notice, which was also refused. The question being raised at this state of the proceedings, the amendment was a matter within the discretion of the court. Had the amendment been permitted, however, we think there was no sufficient evidence to warrant the jury in saying that the applicant's home was at any other place than as stated in the application.

Error is also assigned upon the refusal of the court to give defendant's eighteenth request to charge, as follows: "In this case some comment has been made by counsel upon the fact that T. W. Mould, who appears to have been the financial secretary of the local chapter of the National Union, had knowledge of the physical condition of B. B. Hann, and that he testified to having knowledge that he was in bad condition before being admitted to said local chapter. I charge you that his knowledge of the condition of B. B. Hann before his admission to the order would not be the knowledge of the defendant, and would not charge the defendant with knowledge."

The record is silent as to whether the plaintiff claimed ⁵³²

that knowledge of Mr. Mould was the knowledge of the company. In the brief of plaintiff's counsel it is stated that such claim was not made, but that, Mr. Mould being called as a witness for defendant for the purpose of showing that Hann was in poor health, yet admitting that he voted to admit him into the order, Mould's testimony ought not to have much force, for the reason that had he believed the applicant unfit for membership he would have said so, or by his ballot prevented his admission. It is evident that the witness must have regarded Mr. Hann as fit for membership, or he was not discharging his duty to the order in not advising it of the fact. If this was true, his testimony upon the trial was open to the criticism made. As we have no evidence from the record that any other claim was made for this testimony, we are not inclined to hold that the refusal of the court to charge as requested is reversible error. The instruction of the court that the jury must find the actual good health of the assured, necessarily excluded any idea that the company could be estopped by the knowledge of Mr. Mould.

Judgment affirmed.

The other justices concurred.

LIFE INSURANCE.—REPRESENTATIONS OF INSURED, WHEN DEEMED WARRANTIES: See note to *Continental Life Ins. Co. v. Rogers*, 59 Am. Rep. 816-822; *Day v. Mutual Ben. Life Ins. Co.*, 29 Am. Rep. 575-578. If the insured makes unqualified statements in his application, and stipulates that his policy is to be void if those statements are untrue, the materiality of any assertion found to be untrue, or the belief of the insured that such assertion was true, cannot be considered: *Day v. Mutual Ben. Life Ins. Co.*, 1 McAr. 41; 29 Am. Rep. 565; *Olemens v. Supreme Assembly*, 131 N. Y. 486; *Centennial Life Assn. v. Parham*, 80 Tex. 519; unless the legislature has so provided: *Johnson v. Maine Ins. Co.*, 83 Me. 182, as is the case in Pennsylvania: *Hermany v. Fidelity Mut. Life Assn.*, 151 Pa. St. 17; *Fidelity Mut. Life Assn. v. Ficklin*, 74 Md. 172. But where a certificate of benefit insurance is issued on condition that the statements of the application, which were made a part of the contract, were in all respects true, and an acknowledgment at the end of the application recites that the applicant does "hereby warrant each of the foregoing statements to be true to the best of my knowledge and belief," and that "I have not" concealed any material information, it being also agreed that any "untrue and fraudulent statements" made by or for the applicant should forfeit the insurance, the words "best knowledge and belief" will be deemed to qualify the words "untrue and fraudulent statements" as well as the word "true": *Clapp v. Massachusetts Ben. Assn.*, 146 Mass. 519. So, also, when the applicant used these words, "I certify that the answers made by me, etc., are true in which there are no representations or suppression of known facts," at the same time admitting that such statements were a warranty, it was held that the language, being ambiguous, was to be

construed most strongly against the insurer, and that the insured warranted the statements to be true only to the best of his knowledge: *Anders v. Supreme Lodge*, 51 N. J. L. 175.

LIFE INSURANCE.—GOOD HEALTH, MEANING OF: See generally the extended note to *Continental Life Ins. Co. v. Yung*, 3 Am. St. Rep. 634-637. The Michigan case, *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, there referred to, was afterwards reported in 8 Am. St. Rep. 894. Another note on the same subject will be found appended to *Maine Ben. Assn. v. Paris*, 10 Am. St. Rep. 242-245.

machinery incident to a printing-house would tend to cause the falling of her building and said party wall, and that she was negligent and careless in thus permitting said machinery to be used in her said building." The petition then sets forth specifically the damages claimed to have been sustained by plaintiffs by reason of the alleged wrongful acts, and refers to an account which is filed with the petition as setting forth all the items of damage and amount claimed as to each.

To this petition appellant filed her answer containing a general denial and also alleging the falling of plaintiff's building, and that the damages, if any, they may have suffered thereby were caused by their own * carelessness and negligence in their own use of said building. A reply of general denial to the new matter of this answer was filed by plaintiffs. The defendant, Andrew J. Lindsay, filed his separate answer consisting of a general denial of the allegations of the petition.

The evidence showed that Mrs. Lindsay was the owner in fee of the property, having inherited it from her mother; that it was not her separate property, and in other respects tended to sustain the allegations of the petition.

At the close of plaintiff's evidence, defendants asked an instruction that under the pleadings and evidence plaintiffs were not entitled to recover. This instruction the court refused to give, and to such refusal defendants excepted.

At the close of all the testimony the defendants again asked the court to instruct the jury as follows:

"Under the pleadings and evidence in this case, the court instructs the jury that the plaintiffs cannot recover, and their verdict must be for the defendant, Jane Lindsay.

"If the jury believe and find from the evidence that the person employed and who did make the changes in the building, number 416 North Third street, to adopt it to the uses and purposes of a printing office for Bailey and Sage was by defendant believed by his reputation in his business to be a competent mechanic to make such changes and repairs, and that the changes and repairs were intrusted to his judgment and the lessees, Bailey and Sage, and also find that he was a proper and competent person to employ and engage in this change and repair, then the defendant is not liable.

"The jury are instructed that a married woman cannot be held liable for a tort or wrong committed by the * direction of her husband. If therefore the jury find from the evidence

in this case that the repairs made on building number 416 North Third street were made under the direction and supervision of her husband, their verdict must be for defendants." Which said instructions the court refused to give, and to such refusal defendants then and there at the time duly excepted.

Thereupon, the court, at the instance and request of plaintiffs, gave the following instructions to the jury, viz:

"The court instructs the jury that, by the terms of the lease read in evidence, dated the nineteenth day of December, 1885, plaintiffs leased from B. M. Chambers, trustee of Anna B. Thatcher, building number 414 North Third street, in the city of St. Louis, Missouri, for a period of five years from the first day of April, 1886, at a stipulated rental of \$1,000 per annum, payable in monthly installments of \$83.03 $\frac{1}{4}$ per month in advance, and by the terms of said lease plaintiffs were required to take good care of the buildings and premises, and at the end of said five years' term surrender it to the lessor named in the lease, his heirs and assigns, with all keys, bolts, latches, and repairs left in as good condition as when received.

"The court further instructs the jury that, if they believe from the evidence that immediately after the execution of said lease plaintiffs entered into said building, and continued to use the same as a paint store and shop until the thirtieth day of May, 1887, and that on said last-named day, without negligence on their part, said building collapsed by the crushing of the north wall and greatly damaged plaintiffs; and if the jury further believe that for a long time prior to the crushing of said wall it had been used as a party wall between said building, number 414 North Third street, ¹⁰ and the property of the defendant, Jane Lindsay, known as 416 North Third street, was the property of the defendant, Jane Lindsay, who, so being the owner of said last-named building, did in the spring of 1887, cause to be made certain alterations and changes in said buildings, and that she caused the same to be made in a careless and unskillful manner, and that she carelessly and negligently caused to be removed certain studding and supports from said building, and that by reason of the removal of said studding and supports an unreasonable amount of pressure was thrown upon said party wall; and if the jury further believe that defendant carelessly and negligently leased her said building to be used as a printing-house, which required heavy machinery, fixtures, and appliances to

be used on the second floor thereof, and in consequence of the removal of said studding and supports, and the use to which she caused her said building to be put, said party wall was weakened, and by reason thereof fell and damaged plaintiffs; and if the jury further believe that the building of said defendant, Jane Lindsay, was old, and the walls thereof weak, and that she knew, or in the exercise of ordinary care and diligence might have known, that the same was weak, and that the removal of said studding and supports, and the use of the machinery incident to a printing-house in said building would tend to cause the same to collapse, and that she was negligent and careless in removing said studding and support, and in thus permitting such machinery to be used in said building, then the jury will find for the plaintiffs, unless you find for the defendant on one or more propositions contained in the following instructions:

"The jury are further instructed that if Farrar & Co., or Charles Farrar, were the agents of Jane Lindsay for the purpose of causing the alterations and changes in question made, then their act was her act, ¹¹ and she is responsible for the alterations and changes in person, without the intervention of an agent.

"The court further instructs the jury that if they find for the plaintiffs and against the defendant, Jane Lindsay, then that they will assess plaintiffs' damages at a sum equal to the damage plaintiffs suffered in loss and damage to their personal property in their said building resulting from the falling thereof, and also the damage to the plaintiffs' leasehold; and in determining the damage to plaintiffs' said leasehold the jury will take into consideration the value of said leasehold to the lessees (plaintiffs herein) immediately before the injuries complained of, and its value immediately after the collapse of their building, and the difference in such value would be the true measure of damages as to said leasehold."

To the giving of which said last three mentioned instructions defendants at the time duly excepted.

And at the instance and request of defendants the court gave the following instructions to the jury, viz:

"The court instructs the jury that defendant, Jane Lindsay, is not liable in this action for any neglect or wrongful act of her husband, if there was any such neglect or wrongful act, in repairing building number 416 North Third street, unless it shall appear to their satisfaction, from the evidence,

that she directed, knew of the character and nature of the same, and suffered such repairs to be improperly and negligently made.

"The court declares the law to be that, under the evidence in this case, the defendant, Jane Lindsay, did not have a separate estate, but an estate in fee simple, in the property in question, number 416 North Third street.

"The court instructs the jury that, by his marriage with Jane Lindsay, the defendant, A. J. Lindsay, was legally entitled to the possession, control, and management ¹² of the premises known as number 416 North Third street, and if they find and believe from the evidence that at the time the repairs complained of were made on the same the defendant, A. J. Lindsay, was in possession and exercising control of said property under his right as her husband, then the plaintiffs cannot recover in this action, although they may find that the repairs were not safely or permanently made."

And the court, of its own motion, gave the following instructions to the jury, viz:

"The jury are instructed that a married woman cannot be held liable for a tort or wrong committed by the direction of her husband. If, therefore, the jury find from the evidence in this case that the repairs made on building number 416 North Third street were made under the direction and supervision of her husband, and that the building was rented to Bailey and Sage for a printing office and stationery store, by or under the direction of her husband, then your verdict should be for the defendant.

"The words 'careless and negligent,' and 'carelessly and negligently,' as used in these instructions, mean without exercising that degree of care which a person of ordinary common sense and prudence, under like circumstances, and in the performance of a like act, would have exercised.

"These instructions are to be taken by the jury altogether, and considered as constituting one whole instruction."

To the giving of which said last three instructions above mentioned defendants at the time duly excepted.

There was a verdict and judgment for the sum of two thousand nine hundred and sixty-six dollars and sixty-six cents in favor of plaintiffs against appellant, Jane Lindsay. There was no finding or judgment for or against her husband and codefendant, Andrew J. Lindsay. The appellant, Jane Lindsay, in due time filed ¹³ motions in arrest of judgment and

for a new trial, both of which motions being by the court overruled, she perfected her appeal to this court.

1. The first contention of defendant is that the court committed error in refusing to instruct the jury that the plaintiffs could not recover as against her, she being a married woman at the time of the committing of the injury complained of, was only the owner of the property in fee, and that therefore the husband alone, if any person, was responsible in damages. The evidence shows that the defendant, Mrs. Lindsay, inherited the property from her mother, and that the repairing and alterations that were made, and which caused the wall to give way and fall and injure plaintiff's paint shop and contents, was carelessly and negligently done, and were made under the supervision of her husband and one Farrar, and by and with her knowledge and consent. Plaintiffs were lessees of the building that was crushed, holding it under a lease for five years.

At common law the husband had almost absolute control over the wife's person; was entitled, as a result of their marriage, to her society, services, and earnings, to her goods and chattels; had a right to reduce her choses in action to possession during her life; could collect the rents and profits of her real estate, and had entire control over her property. She was bound to obey him, was incapable of making contracts except for necessities, so that in law they were regarded as but one person. As a necessary consequence he alone was liable for, and could be sued for, her torts and frauds committed during coverture in his presence or by procurement; otherwise they were jointly liable, and must be so sued. The only torts for which the wife could be sued at common law, and judgment rendered against her, and jointly with her husband, were torts unmixed with any element of contract, such as an assault, libel, ¹⁴ slander, and the like: *Keen v. Hartman*, 48 Pa. St. 497; 88 Am. Dec. 472; 2 Bishop on Married Women, sec. 256; Cooley on Torts, 115; Schouler on Domestic Relations, 102, 103. And even then she was not liable unless the tort was committed out of the presence of the husband, and without his order or consent; otherwise he alone was liable under the presumption that she was induced to commit them under his coercion: *Alexander v. Lydick*, 80 Mo. 341; *Ball v. Bennett*, 21 Ind. 427; 83 Am. Dec. 356; 2 Kent's Commentaries, 10th ed., 143; *Carleton v. Haywood*, 49 N. H. 314.

In the case of *Dailey v. Houston*, 58 Mo. 361, which was an action for assault and battery against the husband and wife, committed by her in the presence of her husband, this court says:

"The general rule seems to be that no joint action will lie against husband and wife for their joint trespass; but the husband alone is liable, and must be sued alone for such trespasses. In the case of *McKeon v. Johnson*, 1 McCord, 578, 10 Am. Dec. 698, this doctrine is fully sustained, and, although it is admitted by the learned judge delivering the opinion that Mr. Chitty in his work on Pleadings, states the law to be different, yet it is asserted that the rule has been well established in this country that no joint action will lie in such case."

The case of *McKeon v. Johnson*, 1 McCord, 578, 10 Am. Dec. 698, was an action against the husband and wife for enticing away and harboring a negro servant in the possession of the plaintiff, and was approved by this court in the case of *Meehan v. Gunsollis*, 19 Mo. 418, which was an action of ejectment against husband and wife.

The general rule of the common law then is that the husband is liable for the torts of his wife, where the act is done by her alone; and whenever, in such a case, she is sued for a tort, the husband must be joined in the suit. If the wrongful act of the wife be committed in the presence and by direction of the husband, he alone ¹⁵ is liable: 2 Kent's Commentaries, 149; Schouler on Domestic Relations, 103. In the case at bar the husband and wife both knew that the changes and alterations were being made in the building, and that it was being paid for out of her means, and made for her use and benefit.

In the case of *Handy v. Foley*, 121 Mass. 259, 23 Am. Rep. 270, which was an action in trespass against the husband and wife for trespass committed by the wife in entering plaintiff's close, and destroying his gate, when her husband was not present, but the act was done by his direction and instigation, it was held they were jointly liable. It was also held in the same case that "the statement in 2 Kent's Commentaries, 149, 'that, if the wife commits a tort in her husband's presence or by his order, he alone is liable,' is too general and must be limited to the case of her acting by his coercion."

In the case of *Roadcap v. Sipe*, 6 Gratt. 213, which was a case of assault and battery against husband and wife for an

assault committed by both of them, it was held that they were jointly liable: *Carleton v. Haywood*, 49 N. H. 314.

In the case of *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66, "the dam of a mill, erected by husband and wife upon land which the wife owned in fee, overflowed land of the plaintiff. It was held, upon common-law principles, that he might maintain an action against both husband and wife for the damages. And it was laid down as a rule, after examining a number of early English decisions, that a married woman may be jointly guilty with her husband of any trespass, whether the injury arising from it be direct or consequential. The court declared the rule laid down by Chitty (1 Chitty's Pleadings, 83) that husband and wife may be joined in all actions in which two or more persons may be jointly guilty, and may be charged jointly, to be well settled." This case ¹⁶ was approved by the St. Louis court of appeals in the case of *Merrill v. St. Louis*, 12 Mo. App. 466; 83 Mo. 244; 53 Am. Rep. 576.

In *Smith v. Taylor*, 11 Ga. 22, the court say: "For torts committed by the wife, not in the presence of her husband, and not by his coercion, they are jointly liable, and must be joined in the action. If there is a recovery, the judgment passes against both. If the wife has a separate estate it may be taken in execution." In the case of *Merrill v. St. Louis*, 83 Mo. 244, 53 Am. Rep. 576, Judge Phillips, in speaking for this court, says: "This declaration meets our approval, and we think it pertinent and just to the profession and the courts to say so."

It will be observed that the law makes a distinction between a class of cases where the tort is committed by the direction of the husband or by the wife in his presence, as in the case of *Dailey v. Houston*, 58 Mo. 361, and in a class of cases where the tort was committed by them jointly, as in the case at bar. In the first-named class the husband alone is liable, while in the latter they are both liable, and must be jointly sued.

If this suit can be maintained against Mrs. Lindsay upon any principle, it must be upon the principle that the tort which is here the cause of action was her tort, and that she and her husband are liable to be jointly sued for it, or by reason of the provision of section 6868 of the Revised Statutes, 1889, which was in force at the time the cause of action accrued, to wit, May 30, 1887. This section reads as follows:

"The rents, issues, and products of the real estate of any married woman, and all moneys and obligations arising from the sale of such real estate, and the interest of her husband in her right in any real estate which belonged to her before marriage, or which she may have acquired by gift, grant, devise, or inheritance during coverture, shall, during coverture, be exempt from attachment or ¹⁷ levy of execution for the sole debts of her husband; and no conveyance made during coverture by such husband of such rents, issues, and products, or of any interest in such real estate, shall be valid, unless the same be by deed, executed by the wife jointly with the husband, and acknowledged by her in the manner now provided by law in the case of the conveyance by husband and wife of the real estate of the wife; provided, such annual products may be attached or levied upon for any debt or liability of her husband, created for necessities for the wife and family, and for debts for labor or materials furnished upon or for the cultivation or improvement of such real estate."

It has been held by this court that this is a disabling statute, and that by its provisions the husband is shorn of all of his marital rights at common law and renders him powerless to bind, charge, or convey, or in any way encumber the real property of his wife except by deed duly executed and acknowledged in conjunction with her: *Mueller v. Kaessmann*, 84 Mo. 318; *Burns v. Bangert*, 92 Mo. 167; *Wannall v. Kem*, 51 Mo. 150; *Clark v. National Bank*, 47 Mo. 17; *Clark v. Rynez*, 53 Mo. 380; *Silvey v. Summer*, 61 Mo. 253; *McBeth v. Trabue*, 69 Mo. 642; *Barlett v. O'Donoghue*, 72 Mo. 563; *Goff v. Roberts*, 72 Mo. 570; *Hord v. Taubman*, 79 Mo. 101. While it held that this statute deprives the husband of all power to convey or dispose of his wife's real estate without joining her with him, it is also held that, in actions of ejectment to recover the possession thereof, he may sue in his own name and that his wife is not a necessary party plaintiff with him: *Bledsoe v. Simms*, 53 Mo. 305; *Cooper v. Ord*, 60 Mo. 420; *Kanaga v. St. Louis etc. R. R. Co.*, 76 Mo. 207; *Dyer v. Wittler*, 89 Mo. 81; 58 Am. Rep. 85; *Peck v. Lockridge*, 97 Mo. 549. It necessarily follows from these decisions that the right of the husband to ¹⁸ the possession of his wife's real property as it existed at common law has not been taken away by this statute.

It is also contended by defendant that a married woman

can have no agent unless she is possessed of a separate estate and such seems to be the law as announced in the case of *Wilcox v. Todd*, 64 Mo. 390; *Hall v. Callahan*, 66 Mo. 316; *Hord v. Taubman*, 79 Mo. 101; *Henry v. Sneed*, 99 Mo. 407; 17 Am. St. Rep. 580. But may she not have a servant to repair her property and preserve it from decay and destruction? An agent is defined to be a person duly authorized to act on behalf of another, or one whose unauthorized act has been duly ratified: 1 Am. & Eng. Ency. of Law, 338; Evans on Agency, Ewell's ed., sec. 1; 1 Sweet's Law Dictionary. Servant is defined by Mr. Webster as follows: "One who serves or does service voluntarily or involuntarily; a person who is employed by another for menial offices or for other labor, and is subject to his command; a person who labors or exerts himself for the benefit of another, his master or employer; a subordinate helper." We take it then that the persons engaged in or about the repairing, changing, and remodeling the building of Mrs. Lindsay were her servants, even if she could not have an agent in regard to her fee-simple property.

Section 6868 of the Revised Statutes of 1889 provides, that the annual products of the wife's realty may be attached or levied upon for any debt or liability created . . . for the cultivation and improvement of such real estate. By this it is clearly implied that the wife's realty may be improved, and who is to do it if she does not? The very fact that she is permitted by law to hold the property in fee, implies that she may improve, repair, and remodel it as the exigencies of the case and the advance of the times may require, and that for that purpose she may employ servants, for whose carelessness¹⁹ and negligence in the manner of its doing she and her husband should be held jointly liable. As was said in the case of *Merrill v. St. Louis*, 83 Mo. 244; 53 Am. Rep. 576. "The law imposes upon every owner of property the duty of so using it as not to injure the property or the persons of others." Should a married woman who owns property worth thousands of dollars, and who may have an impecunious and insolvent husband, be permitted to so use her property as to destroy that of others, and there be no redress therefor? If she is not in such case answerable for negligence to anyone who has been injured by its improper management, who is so answerable? A vast amount of property is now held by married women in this state, as it is held in the case at bar, and the policy of

the law is that those who thus own it beneficially should answer for the tortious and negligent management of it.

We hold that both at common law and under the statute the defendant and her husband are jointly liable for the damages which accrued to plaintiffs in this case by reason of the carelessness and negligence of defendant's servants (if such was the case) in remodeling and changing the building.

2. As Mrs. Lindsay could have no agent in regard to her property as held by this court, the court committed error in instructing the jury that "If Farrar & Co., or Charles Farrar, were the agents of Jane Lindsay for the purpose of causing the alterations and changes in question to be made, their act was her act, and she is responsible for the alterations and changes in her said building as if she had made the contract for such alterations and changes in person, without the intervention of an agent."

And also in instructing the jury that plaintiffs were entitled to recover damages for injuries to their leasehold for the reason that there is no allegation in ²⁰ the petition in regard thereto, but all damages claimed are of a special character as set forth in the itemized account filed with, and made a part of, the petition.

3. In no event is Mrs. Lindsay alone to be held liable for the damages sued for, but she is liable in conjunction with her husband.

4. For the error of the court in giving instructions for plaintiff as herein indicated, and in rendering judgment against Mrs. Lindsay and not against her husband, the cause will be reversed and remanded to be proceeded with in accordance with the views herein expressed. Reversed and remanded. All of this division concur.

HUSBAND AND WIFE—HUSBAND'S LIABILITY FOR TORTS OF WIFE.—A wife is liable for a tort committed by her unless the husband was present and directed the doing of it, when he alone is liable: *Wheeler etc. Mfg. Co. v. Hett*, 115 Pa. St. 487; 2 Am. St. Rep. 575, and note; *Appeal of Franklin*, 115 Pa. St. 534; 2 Am. St. Rep. 583; *Blakeslee v. Tyler*, 55 Conn. 397. A husband is liable for the torts of his wife committed during coverture: *Ball v. Bennett*, 21 Ind. 427; 83 Am. Dec. 356, and note; *Hubble v. Fogartie*, 3 Rich. 413; 45 Am. Dec. 775. See also the extended note to *Commonwealth v. Neal*, 6 Am. Dec. 106, and the note to *Keen v. Hartman*, 86 Am. Dec. 609.

HUSBAND AND WIFE—WIFE'S TORTS—JOINT LIABILITY FOR.—A wife is liable jointly with her husband for her torts, unless she acts under his coercion: *Orangeford v. Doggett*, 82 Tex. 139; 27 Am. St. Rep. 859, and note. For the torts of a married woman committed in the absence of her husband

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they are jointly liable: *Brazil v. Moran*, 8 Minn. 236; 83 Am. Dec. 772, and extended note; *Heckle v. Larvey*, 101 Mass. 344; 3 Am. Rep. 366.

DAMAGES—PLEADING.—In an action in tort and sounding in damages the complaint must state the kind of damages claimed, and the testimony and the jury must be restricted to the allegations: *Spellman v. Richmond etc. R. R. Co.*, 35 S. C. 475; 28 Am. St. Rep. 858, and note; but see *Orman v. Mannix*, 17 Col. 564, 31 Am. St. Rep. 340, where it was held that a general allegation of damage in an action for negligent killing was sufficient to authorize the recovery of such damages as naturally flow from the death.

SIRA v. WABASH RAILROAD COMPANY.

[115 MISSOURI, 127.]

RAILROADS—RIGHT TO REGULATE STOPS.—A railroad company has the right, in the absence of statutory requirements, to determine for itself what trains shall stop at particular way stations. The traveling public is bound to accommodate itself to such regulations as may have been adopted.

RAILROADS—LIABILITY FOR NOT DISCHARGING PASSENGER AT DESTINATION. If a railroad company contracts to carry a passenger to a particular station, and the train on which passage is taken is one which is required under the regulations of the company to receive and discharge passengers at such station, the company commits an actionable wrong in requiring such passenger to leave the train before arriving at the station named.

RAILROADS—EXPULSION OF PASSENGER—BURDEN OF PROOF.—In an action against a railroad company by a passenger to recover damages for being ejected from the train before reaching the station to which the company has contracted to carry him, proof that the train habitually stopped at such station when it was the destination of a passenger on board is sufficient proof of a rule requiring it to do so, and puts the burden of proof on the company to show that such stops are exceptional, and made under special instructions.

EVIDENCE—INTEREST AS AFFECTING ADMISSIBILITY OF.—A statement made by a conductor on a railroad train at the time of taking a passenger's ticket that the train does not stop at the passenger's destination, and that he will have to get off at another station, is a mere declaration by the company's agent in its interest, and is not admissible as evidence of the fact stated.

RAILROADS—DUTY TO PROTECT PASSENGERS—LIABILITY FOR BREACH OF SUCH DUTY.—While it is the duty of a railroad company to preserve order on its trains and to protect its passengers, especially females, from insults and assaults from fellow-passengers, and from annoyances and injuries by disorderly persons, yet to render the company liable in damages for a breach of such duty it is necessary to bring home to the conductor in charge of the train knowledge, or opportunity to know, that the injury was threatened, and to show that by his prompt intervention he could have prevented or mitigated it.

RAILROADS—RAPE—EXPULSION FROM TRAIN AS PROXIMATE CAUSE OF.—If a young lady is wrongfully put off a railroad train before reaching her

destination, and a rape is afterwards committed on her by a passenger who leaves the train where she is put off, the rape is not the direct and immediate consequence of the wrongful act of expelling her when it appears that the station at which she is put off is not an inappropriate or unsafe place for a young and inexperienced female passenger traveling alone to remain until the arrival of a train to carry her to her destination, and that the conductor who allowed the passenger committing the rape to take such female passenger from the train had no reason at the time to believe or suspicion that she would be assaulted or even insulted.

John M. Barker and S. S. Nowlin, for the appellant.

F. W. Lehmann and George S. Grover, for the respondent.

¹²¹ **MACFARLANE, J.** The suit is for damages on account of the alleged wrongful expulsion of plaintiff from one of its trains by the employees of defendant.

The petition charges, in substance, that on the 2d of November, 1888, defendant sold plaintiff a coupon ticket, which entitled her to transportation from the state of Virginia to St. Louis, Missouri, and from St. Louis to Mexico, Missouri, over the road of defendant, but that her destination was Benton city, and defendant, when it sold her the ticket, agreed to let her off at her destination; that on the 4th of November, 1888, at the city of St. Louis, defendant further agreed, in consideration of the purchase of said ticket, to safely and with dispatch transport plaintiff on that night to said Benton city, and on the journey would protect her from harm; that defendant, however, did not keep said agreement, but after receiving plaintiff as a passenger, and before she reached her destination, ¹²² by its servants and agents in charge of the train, withdrew all protection from her, and wrongfully, wantonly, knowingly, recklessly, etc., expelled her, against her consent, from the train in the cold and darkness, about midnight, at the town of Montgomery, in a frightened condition, in the company of one Dick Dusenberry, a passenger on the same train, who, with the knowledge and consent of the defendant's servants, took her into his custody, decoyed her to a saloon, where he held her prisoner for five hours, and ravished her, by reason of which she was greatly injured in body and mind, suffering loss of time and expense, ruined her life and respectability, to her damage in the sum of fifty thousand dollars. The answer was a general denial.

The evidence showed that plaintiff was between sixteen and seventeen years of age, and on November, 1888, she purchased a ticket in Virginia for Mexico, Missouri, intending to

stop at Benton city; that she arrived in the St. Louis union depot on the evening of November 4th, and, after waiting a short time, she was placed upon a train of defendant company which ran through Benton city and Mexico; that after the train had started the conductor came through the car collecting tickets, and informed her that the train did not stop at Benton city, and she would have to get off at Montgomery and wait there for another train. Plaintiff objected, and insisted upon being let off at Benton city, but the conductor refused. During the journey, a man named Dusenberry took a seat beside plaintiff and engaged in conversation with her. When the train was about stopping at Montgomery, the conductor told plaintiff that was the place for her to get off. Dusenberry offered to see her safe to a hotel, to which the conductor assented. Instead of taking her to a hotel, he took her to a saloon, where he brutally abused and ravished her. Upon plaintiff's evidence ¹²³ the court directed a verdict for defendant, and judgment was entered accordingly, and plaintiff appealed.

In a consideration of the ruling of the court, the evidence will be given, so far as necessary, in detail.

Defendant had the undoubted right, in the absence of statutory requirements, to determine for itself what trains should stop at particular way stations, and the traveling public was bound to accommodate itself to such regulations as may have been adopted. Trains could not be safely or successfully run under the direction and management of the passengers. If, then, under the rules of defendant, the train in question was not scheduled to stop at Benton city, the conductor acted properly and within his duty in refusing to stop there for plaintiff, though she took that train under the direction of another agent of defendant who had authority to direct passengers. In such case, if damage results, it must be attributed to the misdirection: 2 Wood's Railway Law, sec. 355; *Logan v. Hannibal etc. R. R. Co.*, 77 Mo. 664; *Marshall v. St. Louis etc. Ry. Co.*, 78 Mo. 610.

Safety and convenience of passengers, as well as the business interests of the carrier require "the adoption and strict enforcement of reasonable regulations for the operation and management of trains. The public has the right to rely upon them," and, if defendant undertook to carry plaintiff to Benton city, and under the regulations it had adopted for the management of its passenger business, the train upon which

she took passage was one which was required to receive and discharge passengers at that station, then under the foregoing authorities defendant committed an actionable wrong in requiring her to leave the train at Montgomery.

Defendant is charged with wrongfully ejecting plaintiff from its train at a station short of her destination. The question whether under the rules of defendant ¹²⁴ this train could have been stopped at Benton city, therefore, became a vital one on the trial. Proof that the train always stopped at that station, or that it habitually stopped there when it was the destination of a passenger on board, would be sufficient proof of a rule requiring it to do so. That character of proof would be all to which a passenger could resort without calling upon the agents of defendant to furnish the evidence. The proof therefore made by plaintiff, that the train in question sometimes stopped at that station, was sufficient to make a *prima facie* case that under the regulations of defendant this train was required to stop there, and to put the burden on defendant to show that such stops were exceptional, and were made under special instructions from the company, if such was the case. It becomes unnecessary, therefore, to inquire whether the burden is not primarily upon the carrier to prove its regulations in regard to running its trains.

Plaintiff testified that the conductor soon after taking up her ticket informed her that the train did not stop at Benton city, and for that reason she would have to get off at Montgomery. Defendant now insists that the conductor's statement respecting the schedule and running orders of his train was not drawn in question on the trial, and should be accepted here as equivalent to an admission that the statement was correct.

The statement of the conductor was a mere declaration of an agent of defendant in its interest and was not admissible as evidence of the fact stated. While it was drawn out by plaintiff it was only done in giving all the conductor stated in his refusal to stop the train. The persistency with which counsel for plaintiff insisted on the introduction of the evidence shows clearly that the truth of the declaration was not confessed.

While the evidence made a case of actionable wrong, whether the judgment should be reversed ¹²⁵ depends upon the sufficiency of the proof of damage to justify a judgment therefor. It will be observed in the first place that no damage

was alleged in the petition except such as especially resulted from the outrage committed upon plaintiff by Dusenberry; and in the second place no other damage was proved. The court allowed plaintiff the greatest latitude in the introduction of evidence in proof of damages. She was permitted to testify to the minutest details of what she suffered at the hands of Dusenberry, and of all facts which had a tendency to aggravate her damages; yet no word of testimony was given of any damage which she would have sustained had she not met with Dusenberry. The demurrer to the evidence was therefore properly sustained, unless the damage from Dusenberry was properly attributable to the acts of defendant's conductor in requiring plaintiff to leave the train at Montgomery.

The suit was really predicated upon the injury received at the hands of Dusenberry, after the plaintiff had left the train at Montgomery. The trial court held in effect that plaintiff could not recover from defendant for such injuries. Plaintiff insists that the court erred in this.

Plaintiff's counsel argues with great earnestness and cites numerous authorities to show the duty required of a carrier to preserve order on trains and to protect their passengers, particularly ladies, from insults and assaults from their fellow-passengers and from annoyance and injuries from turbulent, riotous, and disorderly persons. There can be no doubt of these duties and obligations, but to render the carrier liable for damages from such causes it would be necessary "in each case to bring home to the conductor knowledge or opportunity to know that the injury was threatened and to show that by his prompt intervention he could have prevented ¹²⁶ or mitigated it." This qualification is required in the extreme cases cited by plaintiff: *New Orleans etc. R. R. Co. v. Burke*, 53 Miss. 225; 24 Am. Rep. 689; *Pittsburgh etc. Ry. Co. v. Hinds*, 53 Pa. St. 512; 91 Am. Dec. 224; *Nieto v. Clark*, 1 Cliff. 149; *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 671.

There was no evidence that the damages resulted in this case from requiring plaintiff to leave the train at an improper or dangerous place, as in case of *Evans v. St. Louis etc. Ry. Co.*, 11 Mo. App. 471, and other similar cases cited by him in which the injuries were the natural consequences of the wrongful act.

There was no evidence which tended to prove that Montgomery city was an unsafe or inappropriate place for a

youthful and inexperienced female traveling alone to remain between trains. Indeed it sufficiently appears from the evidence that two respectable hotels were in view of the station, one of them adjoining the platform at which the train stopped. It was shown that no such outrage had previously been perpetrated upon or insult even offered to a lady passenger in the thirty years the road had been operated through the town. There was then no negligence or misconduct on the part of the conductor in his selection of Montgomery as a proper station at which to leave plaintiff to await her train, and the contrary is not seriously urged.

The question then is reduced to the single one, whether the conductor or other train employee permitted Dusenberry to take plaintiff off the train, having at the time reason to believe that he intended to brutally assault her, or even to offer her indignities. The mere fact that Dusenberry offered to conduct plaintiff to a hotel afforded no ground upon which to create a suspicion that an assault and abuse was contemplated. We are not willing to concede that human nature is so depraved that the temporary association of a man and ¹⁸⁷ woman, though strangers to each other, suggests the danger of assault and ravishment as a natural sequence.

But it is insisted by counsel that while plaintiff was a passenger on defendant's train a conspiracy was formed between Dusenberry, the conductor, and train porter that plaintiff should be placed under the power and control of Dusenberry at Montgomery city in order that his evil and beastly lusts might be indulged.

We do not think the evidence warrants a suspicion of so foul a crime. The evidence shows, that, within forty minutes after the train started, the conductor informed plaintiff that the train did not stop at Benton city, and she would have to get off at Montgomery and wait for a train that did stop there. Up to this time, no communication was shown to have taken place between any of the supposed conspirators, or between Dusenberry and plaintiff. It is clear then that the information and direction given plaintiff by the conductor were not in furtherance of a previous conspiracy.

It does appear that after the train had been on its way some time, and after Dusenberry had been repulsed in his advances towards another lady, he took a seat beside plaintiff. In giving her evidence, she did not testify that his attentions on the train were objectionable or distasteful to

her, or that they were such as to attract observation. In her evidence she first mentioned him when she spoke of leaving the train at Montgomery. She testified that when the train slowed up at Montgomery, the conductor said to her "Here is your place where you will have to get off." Dusenberry said: "I board at the hotel where she will go, and I will see her safe to the hotel where I board," and the conductor said "All right." "So I got off and Dusenberry followed me, and said: 'I will take you to the hotel where I board as I told the conductor.'"

129 Another witness, who was a passenger on the train, testified that when Dusenberry sat down beside plaintiff and began conversing with her, she seemed to be somewhat excited, and shrank away from him in the seat. Then he moved his seat behind witness, and pretty soon the negro porter came along, who stopped and talked to him a little bit, and Dusenberry gave him a half dollar, when the negro started out the back end of the car saying "This train does not stop at all stations." This witness testified that he saw Dusenberry and the conductor talking together twice as the train came up. His evidence further shows that these two conversations were in the presence of plaintiff. She said she was trying to persuade him to let her off at Benton. This is the evidence upon which counsel relies to establish a conspiracy.

There is no pretense that plaintiff or anyone else complained to the conductor of Dusenberry's action, or that anything was said or done by him indicating his evil intentions, more than the fact of intruding himself and his attentions upon her, and of this she made no complaint, either at the time or when testifying. If his conduct while on the train was suspicious, she did not notice it, or she would have declined his offer to take her to a hotel, and would have called upon the conductor for direction. We are able to see nothing in the evidence that indicated either a conspiracy to do evil to plaintiff, or that imposed upon the conductor the duty of special protection. The horrible injuries suffered by plaintiff at the hands of Dusenberry, and the resulting damage, were not the direct and immediate consequence of requiring her to leave the train at Montgomery. Judgment affirmed. All concur.

RAILROADS—RIGHT TO REGULATE STOPS.—A railroad company may adopt a regulation that certain trains shall not stop at designated stations where there is no statutory provision to the contrary: *Atchison etc. R. R. Co. v.*

Genta, 38 Kan. 606; 5 Am. St. Rep. 780, and note; *Ohio etc. Ry. Co. v. Searthout*, 67 Ind. 567; 33 Am. Rep. 104, and if a passenger has a ticket for a station at which the train does not stop, he has the right only to ride to an intermediate station: *Richmond etc. R. R. Co. v. Ashby*, 79 Va. 130; 52 Am. Rep. 620.

RAILROADS—DUTY TO LAND PASSENGER AT DESTINATION.—When a railroad company sells tickets to a station at which its trains do not stop unless signaled for the purpose of receiving and discharging passengers, it is generally the duty of the conductor to ascertain if any passenger is to get off there and to stop and allow him a reasonable opportunity to do so. A failure to perform this duty will render the company liable for reasonable damages: *Chattanooga etc. R. R. Co. v. Lyon*, 89 Ga. 16; 32 Am. St. Rep. 72, and note with the cases collected.

RAILROADS—DUTY TO PROTECT PASSENGERS FROM ASSAULT OR INSULT.—This question will be found thoroughly discussed in the monographic notes to *Richmond etc. R. R. Co. v. Jefferson*, 32 Am. St. Rep. 90-101, and *Rommel v. Schambacher*, 6 Am. St. Rep. 734-736. It is the duty of a railway carrier of passengers to exercise the highest diligence reasonably practicable to protect passengers against violence, abuse, or injury from fellow-passengers: *Mullan v. Wisconsin Cent. Co.*, 46 Minn. 474.

CLOUGH v. HOLDEN.

[115 MISSOURI, 336.]

NEGOTIABLE INSTRUMENTS—DEMAND FOR PAYMENT.—If a note is payable at a particular place of business, whether a bank or not, it is sufficient for the holder, in order to charge the indorser, to present the note for payment at the specified place within business hours. He is under no obligation in case of dishonor at that place, to present it for payment elsewhere, or personally to the maker.

NEGOTIABLE INSTRUMENTS—PROTEST—PRESUMPTION AND EVIDENCE TO REBUT.—If the certificate of protest of a notary public states that he presented the note for payment at the place named therein at 5:20 o'clock P. M., the certificate is sufficient on its face to raise the presumption that demand was made within business hours, but evidence is admissible to rebut such presumption and to show that the hour named was not within the customary business hours in the place where the note was made payable.

WITNESSES—INCOMPETENCY, WAIVER OF.—An objection to a witness for personal disqualification cannot be made for the first time in the appellate court.

NEGOTIABLE INSTRUMENTS—PRESENTMENT FOR PAYMENT—WHEN SHOULD BE MADE.—When presentment of a note for payment is made at the place of business of the maker, it must be during the hours when such places are customarily open, or at least while some one is there competent to give an answer. Only when presentment is at the residence is the time extended to the hours of rest.

NEGOTIABLE INSTRUMENTS—DEMAND OF PAYMENT—WHAT NOT SUFFICIENT. A call by a notary at the business office of the maker of a note, in his absence after business hours and after the office has been closed for the

day, with no other effort to find him, is not a sufficient presentment for payment to bind the indorser.

NEGOTIABLE INSTRUMENTS—PROTEST—DUTY OF NOTARY PUBLIC when he receives a note for protest is to make demand for payment of the party primarily liable at his usual place of business, within business hours.

NEGOTIABLE INSTRUMENTS—EVIDENCE OF FRAUD IN OBTAINING.—Under allegations in an answer by an indorser in an action on a note that it was obtained from the maker by fraud and misrepresentation, and without consideration, and that the holder knew it had been so obtained, and that he never paid value for it, evidence is inadmissible to show that the note in suit was a renewal of two prior notes which were given for certain property under false representations, and that the holder of the note in suit claiming to be an innocent purchaser of such prior notes was all the time a partner of the vendor making such false representations.

NEGOTIABLE INSTRUMENTS—EVIDENCE OF FRAUD IN OBTAINING.—In an action against an indorser of a note, evidence to show the fraudulent character of a prior note for which the note in suit was given, and knowledge of such fraud by the holder, is inadmissible in the absence of an allegation that the original note was obtained by fraud.

FRAUD—PLEADING.—When fraud is alleged, the pleading is insufficient unless the facts constituting the fraud are also averred.

Warner, Dean, and Hagerman, for the appellant.

Karnes, Holmes, and Krauthoff, for the respondent.

340 GANTT, J. This action was originally commenced against John B. Bancroft, as maker, and Howard M. Holden, as indorser, of the following note:

"\$4,000.

CHICAGO, October 6, 1888.

"On the first day of July, 1889, after date, I promise to pay to the order of the Union Tie Company, Chicago, \$4,000, at room 70, Home Insurance Building, Chicago, Illinois, value received.

"No. 9995.

JOHN D. BANCROFT."

Indorsed: "Union Tie Company, J. D. Bancroft, Treasurer. Pay to the order of D. M. Clough, Esq., Howard M. Holden, Kansas City, Mo. D. M. Clough. Pay D. Hoyt, cashier, or order, for collection, account of Bank of Minneapolis, M. Bof-ferding, Cashier."

This last indorsement was erased when the action was begun.

341 John D. Bancroft, the maker, entered his voluntary appearance to the cause, and filed his answer. Holden, the indorser, was duly served in Jackson county, and filed his answer.

After the issues were made up Bancroft applied for a change of venue, pending which the plaintiff dismissed as to him, to which action of the court defendant Holden excepted.

The answer of defendant Holden contained, first, a general denial, and these special defenses:

"2. This defendant, for his further answer to said petition, states that it is true that the said Bancroft made, and the said Holden indorsed, the note described in said petition, but defendant further states that he was merely an accommodation indorser, and that he had no greater or further interest in said note than as accommodation indorser for the said Bancroft.

"3. This defendant further states that the said note was obtained from the said Bancroft by fraud and misrepresentation, and without consideration, and that the plaintiff at the time he took said note knew that the same had been obtained from said Bancroft by fraud and misrepresentation, and without consideration, and that he never paid value for the same, and that said Holden was merely an accommodation indorser on said note.

"This defendant, further answering, states that plaintiff in this cause did institute suit against him and the said John D. Bancroft, the maker of said note; that since the institution of said suit, and after answer filed by said Bancroft, plaintiff has dismissed his action and refuses further to prosecute his action against the said Bancroft.

"Wherefore this defendant, having fully answered, asks to be hence discharged, with his costs in this behalf created."

²⁴² To this answer plaintiff filed the following reply:

"The plaintiff, for amended reply to the answer of defendant in the above-entitled cause, says it is true that the defendant Bancroft made, and the said Holden indorsed, the said note described in the petition, but denies each and every other allegation contained in said answer, and says that for value received before the maturity thereof the said note was indorsed and delivered to this plaintiff, and he is now the owner and holder thereof in good faith, without any knowledge then or now that there was any fraud or defect, or failure of consideration in anywise connected with said note, and prays judgment as in the petition."

The trial resulted in a judgment for plaintiff, from which defendant Holden has appealed to this court. The errors assigned will be considered in the order in which it is alleged they occurred.

1. To sustain his case against defendant Holden as an indorser plaintiff offered a copy of the note with all the indorse-

ments thereon as above set forth, with the following certificate of protest:

"STATE OF ILLINOIS, } ss.
Cook County.

"Be it known that on this third day of July, in the year of our Lord, 1889, I, Ben S. Mayer, notary public, duly commissioned and sworn, and residing in Chicago, in said county and state, at the request of the Continental National Bank, went with the original note, of which a true copy is above written, to the office of John D. Bancroft, room 70, Home Insurance Building, at 5:20 P. M., to demand payment thereon, and found the door locked, whereupon I, the said notary, at the request of the aforesaid, did protest," etc. Which certificate was duly signed by the notary, and sworn to before Howard Rope, another notary.

§43 To the introduction of this certificate of protest, defendant objected, for the reason that it appeared the note was payable at an office, room 70, in an insurance building, and the certificate does not recite that this note was presented during business hours; that it could not be said, as a matter of law, that 5:20 P. M. was within business hours.

The court overruled this objection, to which defendant excepted.

Defendant afterwards called Thomas Wright, and this witness having testified, that he was and had been a resident of Chicago for a year and a half, and knew the location of the Home Insurance Building in said city, he was asked what were the ordinary business hours in Chicago, and within what hours business men could usually be found in their offices. The court refused to permit him to answer the question. After repeated efforts to show the custom as to business hours all of which were overruled by the court, "defendant offered to prove by this witness that this presentation and demand for payment was not made in the usual business hours of office men and business men in the city of Chicago," which was by the court excluded, and defendant excepted. The admission of the certificate over objection and the rejection of the evidence to show that a demand for payment, made at 5:20 P. M., was not within business hours, presents the question very clearly in two aspects.

The note sued on was made payable at a specified business place. If a negotiable promissory note or bill of exchange is made payable at a particular bank, presentment for payment

must be made at said bank during banking hours: Tiedeman on Commercial Paper, sec. 317; 1 Daniel on Negotiable instruments, sec. 600; Story on Promissory Notes, 7th ed., secs. 226, 227; Story on Bills of Exchange, secs. 236-349; *Swan* ³⁴⁴ v. *Hodges*, 8 Head, 251. And it is well settled that if a promissory note is payable at a particular business place, whether a bank or not, it will be sufficient for the holder, in order to charge the indorser, to present the same for payment at the specified place within business hours, and he is under no obligation in case of dishonor, at that place, to present it for payment elsewhere, or personally to the maker: *Lawrence v. Dobyns*, 80 Mo. 196; 1 Daniel on Negotiable Instruments, sec. 635; Story on Promissory Notes, sec. 234; *Sulzbacher v. Bank of Charleston*, 86 Tenn. 201; 6 Am. St. Rep. 828; *Brent v. Bank of Metropolis*, 1 Pet. 92; *Cox v. National Bank*, 100 U. S. 716; *Hawkey v. Borwick*, 4 Bing. 13 Eng. Com. Law Rep. 135; *Bank of U. S. v. Smith*, 11 Wheat. 171.

That the note in question was presented at the place designated, the office of Bancroft, room number 70, Home Insurance Building, Chicago, on the day it matured, does not admit of question. On this point the notary's certificate is explicit, but the defendant insisted the certificate of protest was insufficient in not stating that he presented the note within business hours. He states that he presented it at 5:20 o'clock P. M. The certificate is sufficient on its face to raise the presumption that he made the demand within business hours: *Sulzbacher v. Bank of Charleston*, 86 Tenn. 205; 6 Am. St. Rep. 828; *Baumgardner v. Reeves*, 35 Pa. St. 250; *Wiseman v. Chiappella*, 23 How. 368, 379, 380; *Burbank v. Beach*, 15 Barb. 326; *Cayuga County Bank v. Hunt*, 2 Hill, 635.

In these cases, in the supreme courts of the United States and New York, the certificate was general, and the courts ruled the presumption was, that the notary had made the presentment during business hours. We take it that 5:20 P. M. is not such an unusual hour that this court would be justified in holding, as a matter of law, that it was not within business hours in Chicago.

³⁴⁵ "American courts are wont to take judicial notice of the banking hours of any large city lying within the area of the jurisdiction of the court; though there is no authority for supposing that the banking hours of the city of New York would be considered as judicially known to the courts of Boston or Chicago, or *vice versa*. Unquestionably proof would

have to be introduced": Daniel on Negotiable Instruments, sec. 601; Morse on Banking, 371. But, although the notary's certificate is *prima facie* evidence that the note was presented for payment in business hours, it is only *prima facie*. This brings us to the point of controversy in this case, the action of the trial court in refusing to permit the appellant to show that 5:20 P. M. was not within business hours in Chicago. It will be observed that the competency of the witness to speak as to the custom was not challenged because he had not qualified himself. The objection was not to the competency of the witness but of his testimony. It is too late to raise the question of personal disqualification for the first time in this court: *Seligman v. Rogers*, 113 Mo. 642.

The ruling of the court was made squarely upon the subject matter of the proposed evidence. If the evidence was competent, then it was error to exclude it, because it fully met the requirement in that the inquiry was as to the general hours of business in Chicago, among business and office men. The question itself suggested its materiality, but counsel, unwilling to risk that went further and made the offer of proof, which clearly shows it was material, thus complying with the rule announced in *Jackson v. Hardin*, 83 Mo. 178-186; Thompson on Bills, 302; 1 Daniel on Negotiable Instruments, sec. 601.

"When presentment is at the place of business it must be during the hours when such places are customarily ²⁴⁰ open, or at least while someone is there competent to give an answer. It is only when presentment is at the residence that the time is extended to the hours of rest": Daniel on Negotiable Instruments, 603. The rule thus announced by Mr. Daniel is approved by the other text-writers on commercial law, generally.

The question, it must be remembered, is not whether a demand actually made on Bancroft on the day in question after business hours would be good, but, is a call at his business office, after the expiration of business hours, after it was closed for the day, with no other effort to find him, a sufficient presentment to dishonor the bill and hold the indorser? In other words, can a party invoke the right to this constructive demand without making it within business hours? We think that both reason and the authorities generally hold that such a presentment is not sufficient to bind the indorser: *Dana v. Sawyer*, 22 Me. 244; 39 Am.

Dec. 574; *Parker v. Gordon*, 7 East, 385; *Shed v. Brett*, 1 Pick. 412; 11 Am. Dec. 209; *Baumgardner v. Reeves*, 35 Pa. St. 250; *Swan v. Hodges*, 3 Head, 251; *Wiseman v. Chiappella*, 23 How. 268-380; Story on Bills of Exchange, 4th ed., sec. 236; Bayley on Bills, 5th ed., c. 7, sec. 1, p. 199. The rule is tersely stated by Thompson, J., in *Baumgardner v. Reeves*, 35 Pa. St. 250: "It is the duty of the notary when he receives a bill or note intended to be protested, to make demand of the party primarily liable at his usual place of business, within business hours." In *Elford v. Teed*, 1 Maule & S. 28, Lord Ellenborough, C. J., said: "There was not any text-writer upon whose authority a presentment of a bill by a notary at a house of business after it was closed could be sustained. It is laid down in Marius that it must be made during times of business, at such seasonable hours as a man is bound to attend, ²⁴⁷ by analogy to the *horæ juridicæ* of the courts of justice": Marius, 2d ed., 187.

To this line of authorities respondent opposes the case of *Skelton v. Dustin*, 92 Ill. 49-54.

We have examined that case with care, and we cannot find anything in the decision, based upon the facts of the case, that is in conflict with the view we have taken of the law on this subject. That part of the opinion relating to the point under discussion is as follows: "It is said that a bill of exchange should be presented for payment on the day it is payable during the business hours on that day (*Strong v. King*, 85 Ill. 9; 85 Am. Dec. 836), and it is claimed, therefore, that it must be affirmatively shown, which it is said was not done in this case, that the bill was so presented during business hours."

The only evidence there is as to the time of day the bill was presented for payment is found in the notarial certificate of protest, which states that the notary "after the close of the bank presented the same (the bill) at the office of W. C. Barrett & Co., Indianapolis, Indiana, and demanded payment thereof, the time limited for payment having expired." "The certificate is presumptive evidence of presentment during the proper hours of business. These, except where the paper is due from a bank, for the purpose of presenting a note or bill for payment, range through the whole day down to bedtime in the evening": *Cayuga County Bank v. Hunt*, 2 Hill, 685; *Farnsworth v. Allen*, 4 Gray, 453; Edwards on Bills, 536. "There is no evidence that W. C. Barrett & Co. were bankers. The statement that the 'time limited for payment had expired,' does

not import, as contended, that the presentment for payment was after the close of business hours." "It means no more than that payment of the bill had become due." To all of which we assent. That case holds, as we have already held, that the certificate of the notary was *prima facie* evidence ^{sae} that the note was presented "during the proper hours of business." In that case, the defendant relied upon the objection to the certificate. In this case when that objection was overruled defendant offered to show affirmatively that the presentment was not within business hours. No such proof was offered in *Skelton v. Dustin*, 92 Ill. 49.

Nor do we question that in different communities "business hours range through the whole day down to bedtime." It is for this reason that we think it is competent and proper to allow the indorser to show what range they took in the city of Chicago at the time this presentment was made or attempted to be made. Mr. Daniel lays it down in section 601, Negotiable Instruments, that, "It is for the jury to say what are business hours, and in fixing them otherwise than in reference to the banks they are to have reference to the general hours of business at the place rather than to the custom of any particular trade." Certainly the authorities cited by the supreme court of Illinois in no way militate against the views we have taken.

In *Cayuga County Bank v. Hunt*, 2 Hill, 685, Judge Cowen begins his opinion with the statement, that "The bill of exchange was payable generally, mentioning no place." No objection was made at the trial that the presentment which was made at number 4 Wall street, where the survivor transacted business, should have been at his residence or any place, "nor was any made to the manner of presentment or the day." He holds that the notary's certificate is *prima facie* evidence that the demand was made at a proper time in the day. If an improper time, it was for the opposite party by cross-examination or otherwise to show it.

In *Farnsworth v. Allen*, 4 Gray, 453, no place of payment was named in the note. The notary on the ^{sae} last day of grace presented it to the maker at his residence after he had retired. It was held good. Bigelow, J., said: "The note declared on, not being payable at a bank or at any place where business was transacted during certain stated hours in each day, was properly presented to the maker at his place of residence"; but even in that case the learned judge held that

such a note ought to be presented within reasonable hours, and he concludes that nine o'clock on the 23d of August is not unreasonable, when it was found necessary to drive nine miles into the country to find the makers.

Edwards on Bills, section 716, is the remaining citation. The author says; "Where a note is not drawn payable at a particular place or at a bank, a demand may be made upon the maker at his residence at any time before the usual hours of rest." But a reference to the work will show that the author is discussing at this place the right of the maker to the whole day in which to pay, and that a suit brought during the last day of grace is premature. At section 719, in discussing the point we have under consideration, he says: "When payable at a bank they should be presented before the hour of closing business of that kind for the day," or "when payable at the counting-room, office, or store of the maker or acceptor they should be presented there within the usual hours of business."

Judge Rapallo, in *Salt Springs Nat. Bank v. Burton*, 58 N. Y. 480, 17 Am. Rep. 265, refers to *Parker v. Gordon*, 7 East, 387, and *Elford v. Teed*, 1 Maule & S. 28, as to the cases upon which the law of presentment of commercial paper is based. Lord Ellenborough himself qualified his own opinion to this extent that a presentment at a bank after banking hours was sufficient, provided a person was stationed there by the banker to return an answer. ²⁵⁰ That case, and *Bank of Syracuse v. Hollister*, 17 N. Y. 46, 72 Am. Dec. 416, stand upon their own peculiar facts, but nowhere is it intimated in either that the court has departed from the general rule.

Woodruff, J., in *Newark India Rubber Mfg. Co. v. Bishop*, 3 E. D. Smith, 48, commenting upon *Garrett v. Woodcock*, 1 Stark, 475, says: "It proceeds upon the distinct ground that, if a banker appoint a person to attend in order to give an answer, a presentment would be sufficient if made before twelve o'clock at night"; but he insists that the general rule is not at all repudiated by that case, but rather affirmed: See authorities cited, *loc. cit.*, p. 54.

Our conclusion is, that the evidence is material and competent, and the court committed reversible error in excluding it.

2. For the reason that the evidence was admissible it follows that the instruction was too narrow, in that it did not require the jury to find that the note had been presented for

payment to the maker within business hours at his place of business, but only required the jury to find that notice of protest had been given to the defendant Holden. His liability was conditioned upon the proper demand upon John D. Bancroft.

3. The remaining point for decision is one of pleading. Under his answer, and to sustain the third paragraph thereof, defendant offered John D. Bancroft, as the maker of the note, as a witness. After Bancroft had testified that the note in suit was a renewal of two former notes given by him to one Warren H. Leland, aggregating six thousand eight hundred and ninety-two dollars and nine cents, and had testified that fraud had been perpetrated on him by Leland in obtaining said notes, and that Clough, the plaintiff, knew it when he reduced the notes to four thousand dollars, the amount of the one in suit, the court, over the objection of counsel for defendant, permitted counsel for plaintiff to take the ³⁵¹ witness and identify four letters from the witness to Clough, and read the same to the jury. In these letters Bancroft agrees to give the four thousand dollar note in suit and five hundred dollars in cash for the two notes previously given to Leland, June 23, 1888. He tells Clough in his letters that Leland had cheated, defrauded, and duped him, Bancroft, but he disliked to see Clough suffer, and accordingly offers this settlement. These negotiations result in Clough taking this note and surrendering the old notes and ten thousand dollars stock in Chippewa Lumber Company.

Defendant, after all this evidence was in, without objection from plaintiff, offered to show that Clough and Leland were partners in all these transactions, and that Clough was a party to the fraud by which Leland obtained the original notes, but that Bancroft was ignorant of these facts when he gave the note in suit, and he made this proposal: "I propose to show by this witness that the consideration of the original notes wholly failed and were without consideration, and that at the time they were given they were given for property or an interest in property sold by Leland to Bancroft; that Clough was part owner and a partner of Leland at the time of the sale of that property to Bancroft, and was acting for and in behalf of Leland at the time this property was sold; and that these notes were then transferred to Clough; and that Bancroft, without notice of the fact at that time of the extent to which he had been deceived as to the consideration of the note—as

to the amount of property which was turned over in payment of the note—made this settlement and gave this new note for the others to Clough, and that Clough had full notice at the time the original notes were given in law and in fact of the consideration of these notes as well as the note that was in suit. We offer to prove that.”

253 To which plaintiff objected as incompetent and not pleaded in the answer. Which objection the court sustained, and defendants duly excepted.

Counsel for defendant then went further and offered to show that the original notes were given for property which Leland represented was in existence, but did not exist; that he did not have the property; that Bancroft relied on his representations, and gave the note for it; that the property was represented to be a new sawmill, and certain lumber and shingles and certain timber in the forest at Point au Frene, Michigan. These notes were given in consideration of the sale of this alleged amount of property; that Mr. Bancroft was ignorant himself as to the value of this property or the amount of it, and was deceived and swindled by these representations, and that he gave these notes after that. When these notes became due they turned up in the possession of and in the custody of Clough, who claimed to be the owner of them. He then supposed that Clough had bought them in good faith, and made this settlement with him by giving him a new note, when Clough, as a matter of fact, was a partner in this all the time with Leland. That is the offer.

“The Court. I don’t think the answer is sufficient to raise any question of fraud, and the offer is excluded.”

To which action of the court, in refusing to admit the testimony offered, the defendant then and there duly excepted.

The answer alleged that the note in suit was obtained from Bancroft, the maker, by fraud and misrepresentation, and without consideration, and that plaintiff knew it had been so obtained and that he never paid value for the same.

Was it competent under such an answer to prove the facts which defendant offered to prove in regard to the original notes? We think not. The pleader 253 saw fit to confine his charge of fraud to the note in suit. Had he only offered to show that the note in suit was obtained by fraud, the evidence would have been competent under his general allegation of fraud under the rule in *Edgell v. Sigerson*, 20 Mo. 494; but it is not reasonable that under such an answer the plain-

tiff would expect to be prepared to meet charges of fraud in a remote transaction out of which this note finally grew, and to the obtaining of which plaintiff was ostensibly, at least, a stranger.

If defendant desired to show that the note in suit had no other consideration than the two notes to Leland; that plaintiff was in fact a party to the fraud in obtaining them, and that the said two notes were without consideration, or had wholly failed, it was his duty by an appropriate answer to state these facts, and advise the plaintiff of the defense on which he expected to rely.

The present answer is not sufficient for that purpose either at common law or under the code, and the trial court properly so held. It may be as well to remark that the cases of *Edgell v. Sigerson*, 20 Mo. 494; *Smalley v. Hale*, 37 Mo. 102; and *Fox v. Webster*, 46 Mo. 181, have never been overruled, but they only held, that pleas of fraud in general terms were good in answer, and when the fraud charged referred only to matters stated in the petition. The bare allegation of fraud has never been sustained as sufficient in a petition under our code, either in law or equity. We have always required the facts constituting the fraud to be averred. A satisfactory reason for the distinction between an answer or other pleading and a petition, in this respect, would be hard to give. The writer will not attempt one: Bliss on Code Pleading, sec. 339.

The cases of *Reed v. Bott*, 100 Mo. 62; *Hoester v. Sammelmann*, 101 Mo. 619, were causes in equity, and ³⁵⁴ what was said in them in regard to pleading was intended to refer to pleading in equity, though neither of the judges who wrote them thought necessary to advert to the distinction.

It becomes unnecessary to discuss the other propositions referred to in the brief of respondents, for the reason that we cannot anticipate, either that defendant will not tender back the old notes and Chippewa Lumber Company stock or that plaintiff will rely upon the compromise. It will be ample time to pass upon those questions when they are fairly in the record.

The judgment is reversed, and the cause remanded for a new trial, in accordance herewith. All concur, except Sherwood, J., who dissents, and Barclay, J., who concurs in the judgment on the ground stated in the first paragraph of the opinion of the court; but he dissents from the third paragraph, and refers to his opinion in *Reed v. Bott* (1889), 100 Mo. 67, for a statement of his views upon the point of difference.

Mr. Justice Sherwood dissented on the ground that in his judgment evidence to show that presentment of the note in suit for payment was not made in the usual hours of office of business men in the city of Chicago was inadmissible, for the reason that no proper foundation for the introduction of such evidence was laid by showing that the witness, who had resided in that city for a year and a half, was acquainted with a well-known usage or custom prevailing there as to the time presentments were accustomed to be made. Without first establishing such foundation the evidence, if received, would have been valueless, and for this reason no error occurred in rejecting it: *Aull Savings Bank v. Aull*, 80 Mo. 199; *State v. Douglass*, 81 Mo. 231; *State v. Leland*, 82 Mo. 260; *Jackson v. Hardin*, 83 Mo. 187; *Krazberger v. Roiter*, 91 Mo. 404; 60 Am. Rep. 283. In the absence of such known custom or usage a presentment for payment of a note, if made within reasonable hours, is sufficient to charge the maker and indorser: *Story on Promissory Notes*, 3d ed., sec. 226; and testimony to establish a known usage which would limit the reasonable hours in which presentment and claim could be made would have to be of a very satisfactory and cogent character: 2 Daniel on Negotiable Instruments, sec. 1013. If the certificate of protest of the notary contains the statement that he called at the maker's or acceptor's place of business to make demand, it is sufficient; and if the maker is not there to respond, the presumption is that the demand was made in business hours: *Subbacher v. Bank of Charleston*, 86 Tenn. 201; 6 Am. St. Rep. 828; *Baumgardner v. Reeves*, 35 Pa. St. 250; *Wiseman v. Chiappella*, 23 How. 368; *Wallace v. Crilley*, 46 Wis. 577. It is within judicial notice that 5:20 P. M. on the third day of July is long before sunset, and not an unreasonable hour at which to make presentment and demand under the rule announced by the following authorities to the effect that aside from banks, business hours for the purpose of making demand for the payment of a note range through the whole day down to the hours of rest in the evening: *Oayuga County Bank v. Hunt*, 2 Hill, 635; *Nelson v. Fottrell*, 7 Leigh, 179; *Dana v. Sawyer*, 22 Me. 244; 39 Am. Dec. 574; *Salt Springs Nat. Bank v. Burton*, 58 N. Y. 430; 17 Am. Rep. 265; *DeWolf v. Murray*, 2 Sand. 166; 1 Daniel on Negotiable Instruments, 4th ed., sec. 602; *Triggs v. Newnham*, 1 Car. & P. 631; *Morgan v. Davison*, 1 Stark. 114; *Wilkins v. Jada*, 2 Barn. & Adol. 188; *Barclay v. Bailey*, 2 Camp. 527; *Swan v. Hodges*, 3 Head, 251; *Story on Promissory Notes*, 3d ed., sec. 226.

"But apart from all other considerations is the controlling one, that the note in question being drawn and made payable in Chicago, Illinois, is to be governed as to the time and manner and the sufficiency of its presentment, demand, and protest by the laws of that state: 1 Daniel on Negotiable Instruments, secs. 911, 912; *Wooley v. Lyon*, 117 Ill. 244"; 57 Am. Rep. 867.

"The supreme court of the state of Illinois has adopted the rule already announced in some of the cases above cited that the certificate is presumptive evidence of presentment during proper hours of business, and that such hours, except in case of bank paper, range through the whole day down to bedtime in the evening: *Stetson v. Dustin*, 92 Ill. 49. This direct ruling by the court of last resort in that state must be held to be conclusive of the question: *Roquette v. Overmann*, L. R. 10 Q. B. 525."

It results from these views that that evidence, to prove that the note in suit was not presented for payment within business hours, was inadmissible, as no foundation had been laid for its admission; and also that the plaintiff made out such a case as would warrant a direction to the jury to find in his

favor; and for these reasons the judgment of the lower court should be affirmed.

NEGOTIABLE INSTRUMENTS—DEMAND FOR PAYMENT—DEMAND AT A PARTICULAR PLACE.—If a note be made payable at a particular place, a demand at that place must be made to authorize a recovery against either maker or indorser: *Mellon v. Croghan*, 3 Mart., N. S., 423; 15 Am. Dec. 163, and note; *Sullivan v. Mitchell*, 1 Car. Law Rep. 482; 6 Am. Dec. 546; *Glasgow v. Pratte*, 8 Mo. 336; 40 Am. Dec. 142, and note; *Smith v. McLean*, N. C. Term Rep. 72; 7 Am. Dec. 693; *Woodbridge v. Brigham*, 12 Mass. 402; 7 Am. Dec. 85; *Farwell v. St. Paul Trust Co.*, 45 Minn. 495; 22 Am. St. Rep. 742; *Brown v. Jones*, 113 Ind. 46; 3 Am. St. Rep. 623, and note. The following line of cases hold, however, that a note payable at a particular place need not be presented for payment at that place in order to hold the maker liable: *McNairy v. Bell*, 1 Yerg. 502; 24 Am. Dec. 454, and note; *Corn v. Gano*, 1 Ohio, 483; 13 Am. Dec. 639, and note; *Washington v. Planters' Bank*, 1 How. 230; 23 Am. Dec. 333, and note; *Ripka v. Pope*, 5 La. Ann. 61; 52 Am. Dec. 579, and note. See the extended note to *Galpin v. Hard*, 15 Am. Dec. 643.

NEGOTIABLE INSTRUMENTS.—DEMAND FOR PAYMENT of a bill or note must be made during business hours at the place designated and according to the prevailing customs: *Wallace v. Gwin*, 15 La. 223; 35 Am. Dec. 202, and note; *Strong v. Kent*, 35 Ill. 1; 85 Am. Dec. 336, and note. A notary must present a bill for payment during business hours at the usual place of business of the acceptor: *Subbacher v. Bank*, 86 Tenn. 201; 6 Am. St. Rep. 828. See the note to *Bank of Syracuse v. Hollister*, 72 Am. Dec. 419. The presentment of a note for payment must be made at a reasonable hour of the day: *Dana v. Sawyer*, 22 Me. 244; 39 Am. Dec. 574, and note.

FRAUD—PLEADING.—In pleading fraud, it is not sufficient to allege the fraud in general terms, but the facts constituting the fraud must be stated: *Albertoli v. Branham*, 80 Cal. 631; 13 Am. St. Rep. 200; *People v. Healy*, 123 Ill. 9; 15 Am. St. Rep. 90, and note; *Andrews v. King County*, 1 Wash. 46; 22 Am. St. Rep. 136, and note; note to *Mason v. Vestal*, 22 Am. St. Rep. 313; *Feeney v. Howard*, 79 Cal. 525; 12 Am. St. Rep. 162; *Missouri Pac. R. R. Co. v. Brazzil*, 72 Tex. 233.

NEGOTIABLE INSTRUMENTS—FRAUD IN PROCURING.—This question is fully discussed in the extended note to *Bedell v. Herring*, 11 Am. St. Rep. 309. See also *Cover v. Myers*, 75 Md. 406; 32 Am. St. Rep. 394, and note.

STATE v. WINGFIELD.

[115 MISSOURI, 423.]

SALE, WHEAT CONSTITUTES.—A sale of personal property is a transfer of the absolute or general property in a thing for a price in money, accompanied by a change in possession.

SALES—DELIVERY TO COMMON CARRIER AS PASSING TITLE.—If goods are delivered to a common carrier for transportation to the purchaser without any condition, such delivery passes the title, although the purchase money is afterwards collected by the vendor or agent at the place from which the goods were ordered.

SALES—DELIVERY TO CARRIER, WHEN DOES NOT PASS TITLE.—When goods are delivered by the vendor to a common carrier, with directions

not to deliver to the buyer until the purchase money is paid, the sale is not complete until such condition is complied with.

INTOXICATING LIQUORS—ILLEGAL SALE UNDER LOCAL OPTION LAW.—One indicted for selling intoxicating liquor in violation of a local option law in force in a certain county, by furnishing to others and forwarding to wholesalers in another county blank orders for liquor, directing it to be shipped in the care of the defendant, who received and delivered the liquor to the persons thus ordering it, who pay him therefor, is not guilty if the liquor is shipped to him as the agent of those who order it, or at their request; but if it is shipped to him as the agent of the wholesalers, only to be delivered to those ordering it on the payment of the purchase price, and any part of it is removed and payment made therefor to the defendant in the county where the local option law is in force, then both he and the wholesalers are guilty of a violation of the law.

INTOXICATING LIQUORS—ILLEGAL SALES—INDICTMENT.—In an indictment for the unlawful sale of intoxicating liquor it is sufficient to charge a sale simply, without stating the name of the person to whom sold, or that the name of such person is to the grand jurors unknown.

J. H. Johnson and S. C. Major, for the appellant.

R. F. Walker, attorney general, for the state.

431 **BURGESS, J.** The defendant was indicted in the circuit court of Howard county for having sold beer in the city of Fayette in that county in violation of the "local option law," which was then in force in that city. The indictment does not allege to whom the beer was sold, and a motion was made to quash it for that reason and because the law is unconstitutional, which motion was overruled.

The evidence for the state shows the following state of facts: The witnesses had gone to defendant's place of business for beer, but were informed by him that he could not let them have it, but he told them they could order it from William J. Lemp of St. Louis. He gave witnesses blank orders which they filled out with the number of cases or kegs they wished, signed them and gave them to defendant to send off for them. These orders were addressed to W. J. Lemp & Co., St. Louis, directing the company to send them the number of cases or kegs they wished, to the care of defendant. The beer was shipped by Lemp from St. Louis, as directed in the orders to defendant in his name and stored by him in his warehouse, and afterwards delivered to the parties ordering it as they called for it, sometimes only a portion of it being called for at a time, as it was delivered; whether the whole amount ordered was taken away at one time or not, the portion that was delivered was paid for at the time.

The court gave the following instructions on behalf of the state against the objections of defendant:

433 "1. The jury are instructed that the law commonly known as the 'Wood local option law' has been in force within the city of Fayette, Howard county, Missouri, since the thirtieth day of July, 1891, and that since said date it has been unlawful for any person within the limits of said city to directly or indirectly sell, in any manner whatever, intoxicating liquors.

"2. If the jury find from the evidence that the defendant, at any time between the 30th of July, 1891, and the twenty-eighth day of November in said year, received within the limits of the city of Fayette, Howard county, Missouri, orders for beer to be delivered in Fayette, and that he forwarded the same to St. Louis, and that beer was sent to defendant at Fayette, under said orders so taken and forwarded by him, and that he received said beer and delivered the same within said city to the parties from whom he had taken said orders, and collected the money for said beer from said parties, within said city, for himself or for W. J. Lemp, then the jury are instructed that they must find the defendant guilty under the first count of the indictment and assess his punishment at a fine of not less than three hundred dollars, nor more than one thousand dollars, or by imprisonment in the county jail not less than six months nor more than twelve months, or by both such fine and imprisonment.

"3. If the jury have a reasonable doubt of the defendant's guilt they must acquit him, but such doubt to justify an acquittal must be a substantial doubt of his guilt based upon the evidence and not a mere possibility of his innocence.

"4. The jury are instructed that if they find from the evidence that defendant sold intoxicating liquors in any quantity within the corporate limits of the city of Fayette between the thirtieth day of July, 1891, and 433 the twenty-eighth day of November, 1891, they will find him guilty under the first count of the indictment.

"They are further instructed that the second count of the Indictment has been dismissed."

The court, of its own motion, declared the law as follows:

"1. Although the jury believe from the evidence that the beer charged in the indictment to have been sold by the defendant was received by him from William J. Lemp, of St. Louis, for parties in Fayette, who had previously signed orders

therefor addressed to said Lemp, yet if the jury believe from all the facts and circumstances in evidence, the conduct of the defendant and the parties signing said order, that the real purpose and intent of said defendant was to sell and he did sell the beer in question between said 30th of July, 1891, and November 28, 1891, in Fayette, Howard county, Missouri, to any of the parties signing such orders, the jury will find a sale by defendant and render their verdict accordingly, or find the defendant guilty."

The court gave instructions for the defendant as follows:

"1. Although the jury may believe from the evidence that between the thirtieth day of July, 1891, and the twenty-eighth day of November, 1891, what is known as the 'local option law' was in force in the city of Fayette, in Howard county, Missouri, you are instructed that any person who had the right under the law to buy beer and have it shipped to the city for his own use, and that such purchase could be made by him in person or through some third person for him, not in any way interested or employed by the seller. If, therefore, you believe that the beer charged in the indictment to have been sold by the defendant was secured by him from William J. Lemp, of St. Louis, for ⁴³⁴ parties in Fayette who had previously ordered the same from Lemp, and by him delivered to said parties, and that the said defendant acted for and represented the parties who ordered and received said beer and was not in any way employed by the said Lemp or acting for himself in selling, then you will find the defendant not guilty.

"2. Although the jury may believe from the evidence that between the thirtieth day of July, 1891, and the twenty-eighth day of November, 1891, certain parties living in Howard county, in the state of Missouri, sent to William J. Lemp, of St. Louis, Missouri, orders for beer to be shipped to the care of the defendant, William Wingfield, at Fayette, Missouri, and that said beer was shipped upon said orders by said William J. Lemp to said Wingfield for the parties making said orders, and by said Wingfield received and stored, and afterwards delivered to the parties ordering the same, still you are instructed that such acts do not constitute a selling of beer as charged in the indictment or a violation of said 'local option law,' unless you further believe from the evidence in the case that the defendant acted for said Lemp in such sale, or was himself the seller.

"3. The court instructs the jury that the law presumes the defendant innocent in this case, and not guilty as charged in the indictment. And you are further instructed that the legal presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land, binding upon the jury in the case, and you should act upon this presumption and acquit the defendant, unless the state by evidence satisfies you of his guilt beyond a reasonable doubt."

The following instructions were asked by defendant and refused:

435 "4. The court instructs the jury that the state has introduced no evidence showing any sale of beer by the defendant as charged in the indictment in the city of Fayette, and you will therefore find the defendant not guilty.

"5. The court instructs the jury that if they find and believe from the evidence that the different witnesses in this case each signed an individual order addressed to William J. Lemp, of St. Louis, Missouri, to send to them so much beer to the railroad company in the city of St. Louis for transportation, then the sale and delivery of the beer was in the city of St. Louis, and the jury will find the defendant not guilty."

The jury returned a verdict of guilty against defendant, and assessed his punishment at a fine of three hundred dollars.

Within four days after the verdict the defendant filed his motion for new trial and in arrest of judgment, both of which were overruled, and to which he duly excepted, and brings the case here by appeal.

Defendant's first contention is that the second instruction given in behalf of the state does not present fairly the law of the case, and that it is in conflict with the second instruction given on behalf of the defendant. The jury were told in the instruction on the part of the state that if defendant received within the city of Fayette, Howard county, Missouri, orders for beer to be delivered in Fayette, and that he forwarded the same to St. Louis, and that beer was sent to defendant at Fayette under said orders so taken, and forwarded by him, and that he received said beer, and delivered the same within said city to the parties from whom he had taken said orders, and collected the money for said beer from said parties within said city for himself or for W. J. Lemp, then he is guilty. The instruction does not embody the law governing the

⁴³⁶ case. It does not tell the jury what is necessary, as it should have done, to constitute a sale. Not only this, but it is in direct conflict with defendant's second instruction, the only material difference being that in one they are told to find the defendant guilty, while in the other they are directed to find him not guilty.

If the sale was at the city of St. Louis, and complete when the beer was delivered to the common carrier for the witnesses of the state, or to defendant for them, the defendant is not guilty of the offense charged.

"By the common law a sale of personal property is usually termed a 'bargain and sale of goods.' It may be defined to be a transfer of the absolute or general property in a thing for a price in money": 1 Benjamin on Sales, sec. 1; Tiedeman on Sales, sec. 1. Blackstone in his Commentaries defines a sale to be "a transmutation of property from one man to another in consideration of some price": 2 Blackstone's Commentaries, 446. See to the same effect *Martin v. Adams*, 104 Mass. 262; *Wittkowsky v. Wasson*, 71 N. C. 451; *Smith v. Weaver*, 90 Ill. 392; Story on Sales, sec. 1; *Creveling v. Wood*, 95 Pa. St. 152-158.

While at common law it was not necessary that the possession of the property sold should be delivered to the buyer in order to constitute a sale, the other terms connected therewith having been complied with, the statute of frauds has now intervened, and something more is required. There must be a change of possession: *Cunningham v. Ashbrook*, 20 Mo. 554.

In the case of *Sarbeck v. State*, 65 Wis. 171, 56 Am. Rep. 624, it was held "that where the contract is silent on the subject, and there is nothing in the transaction indicating a different intention, and a manufacturer residing in one city receives through his agent residing in another an order for goods from a customer there, and ⁴³⁷ fills the order by delivering the goods to a common carrier at the place of manufacture, consigned to such customer at his place of residence, or to such agent for him, the sale is complete, and the title passes at the place of shipment, even though the customer on receiving the goods at his place of residence pays to such agent there the purchase price."

The general rule is that where the goods have been delivered to a common carrier for transportation to the purchaser, the delivery to the common carrier passes the title: Tiede-

man on Sales, sec. 85, and authorities cited: *Kerwin v. Doran*, 29 Mo. App. 397; *Garbracht v. Commonwealth*, 96 Pa. St. 449; 42 Am. Rep. 550; *Dunn v. State*, 82 Ga. 27. And this seems to be the law, although the purchase money is afterwards collected by the vendor or agent at the place from which the goods were ordered: *State v. Hughes*, 22 W. Va. 743.

A different rule prevails where the purchase money does not accompany the order and by direction of the vendor the goods are not to be delivered until the purchase money is paid. In such case the sale is not complete until the conditions are complied with, and this would be at the point of destination of the goods shipped. Such is the law in regard to the shipment of goods or personal property, C. O. D., by express companies, which implies that the goods are not to be delivered until charges and collections are paid; *Dunn v. State*, 82 Ga. 27; *State v. O'Neil*, 58 Vt. 140; 56 Am. Rep. 557. If then the beer was shipped to defendant as the agent of those who ordered it, or at their request, he was not guilty of any offense. But if it was shipped to him as the agent of Lemp, only to be delivered to those who ordered it on the payment of the purchase money, and any part of it was removed and payment made therefor to the defendant at Fayette, then both he and Lemp were guilty of a violation of the law.

428 The case of *State v. Houts*, 36 Mo. App. 265, is not in conflict with the views herein expressed. In that case the evidence showed that the defendant was in the employ of a St. Louis brewery engaged in running a "beer car" along the line of railroad through Scott county; that a few days prior to the delivery of the beer in that county defendant had met the witness in another county, and he gave the defendant an order for one keg of beer, which was afterwards delivered to the witness in Scott county, when he paid defendant for it, and the court very properly held that it was a sale of the beer in Scott county, and that defendant was guilty of violating the law.

We do not think that defendant's objections to the fourth instruction given on the part of the state, and the one given by the court of its own motion, are well taken, as these instructions simply direct the jury that if they find that the defendant sold beer in Fayette between certain dates they will find him guilty. We are unable to see any objection to these instructions. If he only ordered the beer at the request

of certain parties and as their agent, and did not sell it to them, he is not guilty, but if he did sell it or any part of it to them, he is guilty.

As there was some evidence tending to show that the sale of beer was made by defendant, the court did not err in refusing the fourth instruction asked by him.

Nor did the court commit error in refusing the fifth instruction asked by defendant, for the reason that it ignores altogether the evidence in regard to sale by him, and exonerates him on the facts alone of the execution of the orders for the beer, and its delivery to the railroad company regardless of to whom it was consigned, or of any sale by defendant. All that is claimed by this instruction might be true and yet defendant be guilty.

439 The sufficiency of the indictment is challenged by the defendant on the grounds: 1. That it failed to allege the names of the purchasers of the beer; and 2. That the local option law is unconstitutional, and repeals by implication or suspends all other laws in regard to the sale of intoxicating liquors, except alcohol, and enacts a law by the vote of the people, which is penal in its character.

In regard to the first proposition, there has been much confusion in the appellate courts of this state. But the law is now quite well settled that in an indictment for the unlawful sale of liquor it is sufficient to charge a sale simply without stating to whom sold, or that such person was to the grand jurors unknown: *State v. Ladd*, 15 Mo. 430; *State v. Miller*, 24 Mo. 532; *State v. Fanning*, 38 Mo. 359; *State v. Rogers*, 39 Mo. 431; *State v. Jaques*, 68 Mo. 260; *State v. Martin*, 108 Mo. 117; *State v. Melton*, 38 Mo. 369.

This precise question was passed upon by the St. Louis court of appeals in the case of *State v. Houts*, 36 Mo. App. 265, which was a prosecution for the sale of beer in violation of the local option law, and it was held that it was not necessary to the validity of the indictment that it should set out the name of the person to whom the sale was made.

As to the unconstitutionality of the local option law, that question has been three times before this court, and it has as often been held by a majority of the court that the law is constitutional: *State v. Pond*, 93 Mo. 617; *Ex parte Swann*, 96 Mo. 44; *State v. Moore*, 107 Mo. 79. My own opinion is now, and always has been, that the law is unconstitutional, because, as said by Sherwood, J., in the dissenting opinion in

the case of *State v. Pond*, 93 Mo. 617, "it was incomplete and without sanction when it left the legislature, and was therefore a delegation of legislative power, and because it repeals ⁴⁴⁰ or suspends general laws in particular localities." In the case of *Winterton v. State*, 65 Miss. 238, it was held that the effect of the adoption of a local option law by the people was not to repeal but to suspend for the time prescribed in the act the former general laws for the regulation of the liquor traffic.

In the case of *State v. Bevans*, 52 Mo. App. 132, the St. Louis court of appeals, Rombauer, P. J., delivering the opinion, says: "The attention of the supreme court does not seem to have been called to the fact that section 4605 of the local option law only permits the sale of pure alcohol by druggists, and hence impliedly prohibits the sale by druggists of intoxicating liquors other than pure alcohol, under section 4621, in any county where the local option law has been adopted." If this be the law, then the sale of intoxicating liquors other than pure alcohol is absolutely prohibited in all counties having adopted the local option law. Because of the error of the court in giving the second instruction on behalf of the state, the cause is reversed and remanded to be tried in conformity with this opinion. All concur.

SALE—WHAT CONSTITUTES.—A sale of a chattel is the transfer of the property in it for a consideration, and is ordinarily effected by the delivery of the thing sold to the buyer and the delivery of the price to the seller: *Stephens v. Gifford*, 137 Pa. St. 219; 21 Am. St. Rep. 868, and note; *Hill v. Hill*, 1 N. J. L. 261; 1 Am. Dec. 206; *Huthmacher v. Harris*, 38 Pa. St. 491; 80 Am. Dec. 502, and note; *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522; *Coulter v. Portland Trust Co.*, 20 Or. 469. See the extended note to *Brets v. Diehl*, 2 Am. St. Rep. 711.

SALES—WHETHER DELIVERY TO CARRIER PASSES TITLE.—This question will be found thoroughly discussed in the extended notes to the following cases: *McNeal v. Braun*, 26 Am. St. Rep. 451; *Commonwealth v. Fleming*, 17 Am. St. Rep. 771; and *State v. Carl*, 51 Am. Rep. 570. And see also *Falvey v. Richmond*, 87 Ga. 99.

INTOXICATING LIQUORS—ILLEGAL SALES.—A case very similar to the leading case is *State v. Hart*, 84 Iowa, 215, in which the defendant was a member of a wholesale liquor firm which had appointed one G. as their agent in the town of O. for the purpose of handling and delivering their goods. The defendant was indicted as a principal of G. for maintaining a liquor nuisance in the town of O. It was shown that the liquors sold by G. on the premises in question were in fact purchased by him, and that he rendered no account of them to the firm. It was held that a verdict finding the defendant guilty was erroneous. A sale of liquor in the hands of a carrier by a consignee without a license, to whom it had been consigned C. O. D., is a violation of the

statute against selling liquors: *Hunter v. State*, 55 Ark. 357. See *Commonwealth v. Fleming*, 130 Pa. St. 138; 17 Am. St. Rep. 763, and note; and the extended note to *Graves v. Johnson*, 32 Am. St. Rep. 452.

INTOXICATING LIQUORS—SUFFICIENCY OF INDIOTMENT.—In *State v. Martin*, 108 Mo. 117, it was held that an indictment or information against a druggist for an illegal sale of liquors must state the name of the person to whom the liquor was sold. That case is in apparent conflict with the leading case.

CITY OF CLINTON v. HENRY COUNTY.

[115 MISSOURI, 537.]

ASSESSMENT OF PUBLIC PROPERTY FOR LOCAL IMPROVEMENT.—Constitutional and statutory enactments merely exempting state, county, and municipal property from taxation, do not necessarily exempt it from special local assessments. A courthouse square is not exempt from assessment for local street improvement.

ASSESSMENT OF PUBLIC PROPERTY FOR LOCAL IMPROVEMENT—CONSTRUCTION OF STATUTE.—General language in a statute giving to cities power to levy local assessments for street improvement is not sufficient to embrace the property of the state or of a county which is devoted to strictly public uses, nor authorize the enforcement of such special assessment against it under a general judgment against the county.

ASSESSMENT OF PUBLIC PROPERTY FOR LOCAL IMPROVEMENT—STATUTORY REMEDY.—If a statute creates a new right and prescribes a remedy, the statutory remedy is exclusive. This rule applies to the collection of local assessments on public property for street improvement.

ASSESSMENT OF PROPERTY FOR LOCAL IMPROVEMENT—ENFORCEMENT OF—CONSTITUTIONAL LAW.—A statute attempting to authorize a personal judgment against property owners on special assessments for local improvement is unconstitutional and void.

ASSESSMENT OF PUBLIC PROPERTY FOR LOCAL IMPROVEMENT.—PROCEEDINGS TO ENFORCE special assessments on public property for a local improvement are in the nature of proceedings *in rem*, and compulsory payment of the judgment can only be by a sale of the assessed property; and as such property cannot be sold under execution, the lien cannot be enforced against it unless a specific remedy is provided by statute.

ASSESSMENT OF PUBLIC PROPERTY FOR LOCAL IMPROVEMENT.—PAYMENT OF a tax assessed against a public courthouse property for a street improvement made in the courthouse square cannot be enforced by general judgment against the county.

ASSESSMENT OF PUBLIC PROPERTY FOR LOCAL IMPROVEMENT.—Property devoted to strictly public purposes may by statute be made liable for local improvement assessments, and the statute may also provide for the payment of such assessment out of the public treasury.

ASSESSMENTS AGAINST PUBLIC PROPERTY FOR LOCAL IMPROVEMENTS ARE INVALID and cannot be enforced except by virtue of express statutory enactment or necessary implication.

Peak, Yeager, and Ball, and W. C. Stewart, for the appellants.
James Parks and Son, for the respondent.

⁵⁶³ BLACK, P. J. The city of Clinton, a city of the third class and the county seat of Henry county, caused a number of its streets to be curbed, guttered, and macadamized, and issued tax bills to the contractors in payment for the work; and this is a suit in the name of the city to the use of the contractors against Henry county to collect certain of the bills issued against the courthouse square. This square was duly set apart by the proper county authorities for a "public or courthouse square" as far back as 1836, and the county built a courthouse thereon in 1840. The square is still held by the county and used for such public purposes. The circuit court held that the property was not legally liable for the payment of the tax bills.

1. The first inquiry is whether the constitution or statutes exempts this property from such charges. Section 6 of article 10 of the constitution provides that ⁵⁶⁴ "the property, real and personal, of the state, counties, and other municipal corporations, and cemeteries, shall be exempt from taxation"; and section 7504 of the Revised Statutes of 1889 provides: "The following subjects are exempt from taxation:
4. Lands and other property belonging to any city, county, or other municipal corporation in this state, including market-houses, town-halls, and other public structures, with their furniture and equipments, and all public squares and lots kept open for health, use, or ornament," etc.

While the statute and the constitution speak of taxes and taxation, they do not mention local assessments. It is true such assessments are levied by virtue of the taxing power of the state, but there is a broad distinction between local assessments and taxes levied for general public purposes. Thus it was held in *Lockwood v. St. Louis*, 24 Mo. 20, that church property was liable for special sewer assessments, though the general authority given to the city to levy and collect taxes was confined to "property made taxable by law," and by the general law church property was expressly exempted from state and county taxation. In *Sheehan v. Good Samaritan Hospital*, 50 Mo. 156, 11 Am. Rep. 412, the charter of the defendant exempted its property from "taxation of every kind," and yet its real property was held liable for special street improvement assessments. The exemption was held to relate only to ordinary taxes levied for general purposes, and not to special improvement assessments.

The whole subject was again considered in the recent case

of *Farrar v. St. Louis*, 80 Mo. 379. The assessments there in question were about to be levied for the purpose of paving, curbing, and guttering a street. The law under which the work was done provided that the cost thereof should be levied on the abutting property according to the front feet of each ~~see~~ lot, and it was insisted that the law was void because it violated that clause of the present constitution which declares that "all property subject to taxation shall be taxed in proportion to its value"; but this court held that the assessment was not a tax within the meaning of that clause of the constitution. It was also held that special local assessments were not included in the words of the eleventh section of article 10 of the constitution which declares that "said restrictions as to rates shall apply to taxes of every kind and description, whether general or special."

It must be taken as settled law that the clause of the constitution and the general law before quoted do not refer to or include special local assessments. It follows that this property, though held and used for public purposes, is not exempt from local assessments, either by the constitution or general law. Indeed, the general statute and the clause of the constitution relating to the exemption of property from taxation have nothing whatever to do with this case.

The question whether public property, such as courthouse property, should share in paying for street improvements is one open to the legislative will. We must therefore look to the statute relating to cities of the third class to see what the legislature has declared upon this subject. We repeat that the constitution and general law relating to exemption from taxation have no bearing upon the issue of law in this case. The question is one of delegated power, and not of exemption from taxation.

2. The law relating to cities of the third class, under which this work was done, provides that such cities shall have power "to enact ordinances" for designated purposes, and, among others, "to open and improve streets, avenues, and alleys"; and, to pay therefor, "shall have power to make assessments in the ~~see~~ following manner: . . . 3. For paving, macadamizing, curbing, and guttering all streets, avenues, and alleys, . . . the assessment shall be made for each block separately, on all lots and pieces of ground on either side of such street or avenue, the distance improved or to be improved, or on the lots or pieces of ground abutting on such

alley, in proportion to the front foot": Rev. Stats., 1889, sec. 1495.

The assessments "shall be known as special assessments" and shall be "levied and collected as a special tax, and a special tax bill shall issue therefor, and shall be paid in the manner provided by ordinance"; and every such special tax bill "shall be a lien against the lot of ground described in the same until paid": Rev. Stats., sec. 1496.

The tax bills are "assignable and collectible in an action brought in the name of the city to the use of the holder"; and it is provided further that the lien shall continue for one year, or "until the final determination of any legal proceedings to collect the same": Rev. Stats., sec. 1500.

The language of the law as to the property subject to assessment is "on all lots and parcels of ground on either side of such street." The question is, whether such language includes property held by a county for strictly public purposes.

It is a well-settled principle of common law that the crown is not bound by a statute, the words of which tend to restrain or diminish any of his rights or interests, unless he be specially named therein: 1 Blackstone's Commentaries, 262. The same principle applies in favor of the states in this country: Endlich on Interpretation of Statutes, sec. 161. Says Kent: "It is a general rule in the interpretation of statutes limiting rights and interests not to construe them to embrace the sovereign power or government unless the same be expressly named therein or intended by necessary implication": 1 Kent's Commentaries, ⁵⁶⁷ 13th ed., 460. Hence it is that, as a general rule, tax laws are understood and intended to apply to private, and not to public, property: Endlich on Interpretation of Statutes, sec. 163.

It is held in Massachusetts, as it is here, that the exemption of the real estate of incorporated charitable and agricultural societies from taxation is an exemption from taxation for general public purposes, and not from taxation for local improvements (*Boston etc. Soc. v. Boston*, 116 Mass. 181, 189; 17 Am. Rep. 153), but it is held by the same court in the next case that land of a county used for county purposes is not subject to taxation of any kind and hence not liable for local assessments: *Worcester Co. v. Mayor etc.*, 116 Mass. 193; 17 Am. Rep. 159. There a sewer assessment had been levied upon property of the county used for a courthouse, jail, and house of correction. The proceeding was one by *certiorari* to quash

the assessment. Says the court: "Its property [property of the commonwealth] constitutes one of the instrumentalities by which it performs its functions. As every tax would to a certain extent diminish its capacity and ability, we should be unwilling to hold that such property was subject to taxation in any form, unless it were made so by express enactment or by clear implication. This property of the petitioners is not indeed, in legal form, the property of the commonwealth, but the authority by which the county holds it is derived from the statutes by which the duty is imposed upon the various counties of providing suitable courthouses, jails, and houses of correction." Estates so held "for the uses and purposes of the commonwealth are essential to the administration of the executive and judicial duties of its government and are not to be deemed subject to taxation in any form, unless the intent of the legislature to render them so clearly appears."

see The same principle was applied in the following local improvement cases, though the property sought to be assessed was in fact and in form state property: *State v. Hartford*, 50 Conn. 89; 47 Am. Rep. 622; *County Commrs. v. Board of Managers*, 62 Md. 127; *Polk Co. Sav. Bank v. State*, 69 Iowa, 24; and by this court in *Abercrombie v. Ely*, 60 Mo. 23. The effort in that case was to enforce a mechanic's lien against a schoolhouse which was public property. The words of the lien law were sufficiently general to embrace schoolhouses and all other public buildings, but it was held that the terms of the statute should be restricted so as to apply only to property belonging to private individuals. We find nothing in the case of *Hassan v. Rochester*, 67 N. Y. 528, in conflict with what has been said. The judgment in that case stands upon the ground that the city charter specified the kind of state property there in question as subject to local assessments, and the opinion gives recognition to the general rule of interpretation applied in the cases just cited.

The statute giving to cities power to levy local assessments for street improvements uses the most general language. Such language is not sufficient to embrace the property of the state or property of the county which has been devoted to strictly public uses, which in fact constitutes one of the instrumentalities provided for carrying on the state government.

But there are other considerations not to be overlooked in seeking for the intention of the legislature. In the first place property owned by a county or other municipal corporation

and used for public purposes cannot be sold on execution. It is against public policy to permit such property to be sold; for the effect of a sale would be the destruction of the means provided by law for carrying on the government: 2 Dillon on Municipal Corporations, 4th ed., secs. 576, 577; Freeman on Executions, 2d ed., sec. 126. And section 2344 of the Revised Statutes, of 1879, is declaratory of the same principle. Hence it has been held that a schoolhouse cannot be sold under a judgment against the board of education: *State v. Tiedemann*, 69 Mo. 306; 38 Am. Rep. 498. It is indeed clearly and distinctly admitted by the plaintiffs that this courthouse property cannot be sold to satisfy these assessments. The plaintiffs do not pray for a judgment enforcing the lien, the remedy and only remedy given by the statutes, but they ask a general judgment against the county.

In the next place, it is a general rule of law that where, as here, the statute creates a new right and prescribes a remedy, the statutory remedy is exclusive: Endlich on Interpretation of Statutes, sec. 154. And the principle applies to the collection of these local assessments: *Roxbury v. Nickerson*, 114 Mass. 544; *West Roxbury v. Minot*, 114 Mass. 546; *Worcester Co. v. Mayor etc.*, 116 Mass. 193; 17 Am. Rep. 159; *Edgerton v. Huntington School Tp.*, 126 Ind. 261. It was held in the case of *St. Louis v. Clemens*, 36 Mo. 468, under a law making tax bills a lien on the property assessed, and providing that the contractor might collect the tax bills by "ordinary process of law"; that the proceeding was one *in personam*, and that the contractor was entitled to a general judgment to be enforced by a general execution. But that case was overruled by the subsequent cases of *Neenan v. Smith*, 50 Mo. 526, and *St. Louis v. Allen*, 53 Mo. 44. These cases hold that local assessments can be upheld alone on the ground of compensation in benefits to the particular property assessed, and in view of which it was held that the words "ordinary process of law" meant such process as was adapted to the enforcement of the lien. The case last cited goes much further and holds, and holds distinctly, that a law attempting to authorize a general judgment over against the property owner on a special ⁵⁷⁰ tax bill would be unconstitutional and void. Since the ruling made in those cases it has been repeatedly held that the judgment must be, and can only be, one enforcing the lien against the particular property. Such is the settled law of this state: *Carlin v. Cavender*, 56 Mo. 286; *St.*

Louis v. Bressler, 56 Mo. 350; *Seibert v. Copp*, 62 Mo. 182; *Louisiana v. Miller*, 66 Mo. 467; *Higgins v. Ausmuss*, 77 Mo. 351.

According to these adjudications, proceedings to enforce special tax bills are in the nature of proceedings *in rem*, and compulsory payment of the judgment can only be by a sale of the assessed property. As public property like that here in question cannot be sold on general or special execution, and as the legislature has provided no other remedy than that of enforcement of the lien, it is quite evident that the statute in question does not apply to or include property owned by a county and used for governmental purposes.

It is true the cases last cited were all suits against private property owners; and as it is within the power of the legislature to make property devoted to public uses liable for local assessments, and as it is contrary to public policy to permit public property to be sold, we may and do concede that the legislature can provide for the payment of local assessments against public property out of the general treasury. Such a provision would doubtless be sufficient to show an intent to make such property liable for these assessments; but the legislature has made no such provision. The argument, therefore, that the courts can devise a remedy where there is a right does not meet the issue in this case; for the real question is, whether the city had the power or right to levy the assessments upon public property, and we are unable to find any evidence of such a legislative intent.

The plaintiffs place much reliance upon the case of ⁵⁷¹ *St. Louis Public Schools v. St. Louis*, 26 Mo. 468. The report of that case shows that the school corporation based its right to injunctive relief on the sole ground that the general revenue law exempted its property from local assessments as well as from taxation for general purposes. This court ruled that question then, as it would now, against the schools. No other question was presented or considered. It may be, the city charter made the vast amount of property held by the schools liable for assessments for street improvements; but that was not the question in dispute. That case is authority for the conclusion reached in the first part of this opinion, but we do not see that the case goes any further. As to many of the other cases cited by plaintiffs, it may be observed that there is a wide difference between property held and used for strictly public uses, as for courthouse and jail purposes, and property held by corporations organized for private gain,

though the property is in a sense devoted to public use, as the property of railroads and cemetery companies. This difference will distinguish many of the cases cited by counsel for the plaintiffs from the one now in hand. The property here in question is strictly public property, and on well-settled principles of law cannot be held liable for these local improvement assessments until the legislature so says in clear terms or by necessary implication, and that it has not done by the statute relating to cities of the third class.

There is much merit in the argument that the public, the beneficial owner of the courthouse property, ought, as a matter of fairness, to bear a part of the cost of improving the streets, but the argument addresses itself to the legislature. Courts must declare the law as they find it.

The judgment is affirmed. BARCLAY, J., absent. The other judges concur.

TAXATION AND ASSESSMENT OF PUBLIC PROPERTY.—This question is thoroughly discussed in the monographic note to *Board of Commrs. v. Ottawa*, 33 Am. St. Rep. 400-413. An assessment of public school property for local improvements is not authorized by a statute which, in general terms, requires the assessment to be upon all real estate in the district: *Board of Improvement v. School District*, 56 Ark. 354; 35 Am. St. Rep. 108, and note.

DEMETER v. WILCOX.

[115 MISSOURI, 634.]

VENDOR'S LIEN—PAYMENT OF PURCHASE MONEY BY VOLUNTEER—SURREIGATION.—One person cannot acquire a lien upon land purchased by another by the voluntary and unauthorized payment of the purchase money; nor can he by simply paying the debt due the vendor be subrogated to the latter's lien therefor.

VENDOR'S LIEN—PRIORITIES.—If one person advances money to pay the unpaid purchase money for land at the request of the purchaser, under an agreement with him that he is to have a mortgage on the land to secure his purchase money, the mortgage to be executed as soon as the money is paid and a deed executed by the vendor, and in pursuance of this agreement the money is paid, the deed made, and the mortgage executed and delivered to the party advancing the money, then it all becomes one transaction, and the mortgage thus given will take precedence of all other liens or encumbrances on the land of the mortgagor.

MORTGAGE FOR PURCHASE MONEY—PRIORITY.—A mortgage given by a purchaser in possession of land under a bond for title to one who advances the purchase money due, under an agreement between the parties that the purchaser is to give the party making the advances a mortgage upon the land upon receiving a conveyance thereof from the vendor, is entitled to priority in equity over a prior mortgage executed by the purchaser to a third person.

Dyart and Mitchell, for the appellants.

R. S. Matthews, for the respondent.

⁶²⁷ BURGESS, J. Suit in equity. The land in question was owned by the Hannibal and St. Joseph Railroad Company. In November, 1868, it sold to one Web M. Rubey on time, and gave him bond for deed in payment of the purchase money. On the ⁶²⁸ sixteenth day of October, 1871, Rubey assigned said contract to Thomas G. Yale, who took possession of the land, and improved it. And afterwards, on the fourteenth day of January, 1875, Yale and wife conveyed by deed twelve and one-half acres of land in Macon county to Needham, and at the same time Yale delivered said railroad contract to Needham, but without assignment; and on the same day, January 14, 1875, Needham gave Yale a deed of trust on the twelve and one-half acres and on his equity in the forty-acre tract in controversy to secure the sum of five hundred dollars, in four notes falling due in one, two, three, and four years. Thereupon Needham took possession of the land in question, farmed it, and made some improvements.

Needham also made several payments to the railroad company on the contract, and subsequently, prior to January, 1881, renewed the contract with the railroad company, whereby the old or Rubey contract was surrendered, and a new one issued in its stead for the same land and for the balance of the purchase money remaining unpaid. This latter contract was issued by the railroad company to and in the name of Needham.

Needham made several payments to the company on this latter contract through its agents, Walker and Gilstrap, so that on or about January 11, 1881, and prior thereto, there remained unpaid and due the railroad company on said contract for the purchase of said land the sum of two hundred and thirty-one dollars and eighty cents. Of this sum Needham paid thirty-one dollars and eighty cents. The balance of this sum—two hundred dollars—was paid by plaintiff, E. J. Demeter. The money was paid by Demeter to W. G. Walker, the agent of the railroad company, for the company, and as the last payment on said land. This balance was paid upon the condition and the express understanding between Demeter, Needham, and the agents of the railroad company that ⁶²⁹ Demeter was to be secured on the land when the deed was made by the company to Needham.

It seems that the method of securing Demeter on the land was largely left to Walker and Gilstrap. Anyway, this plan was adopted and carried out: The money was sent to the railroad company with request that the company execute a deed to Needham, the holder of the contract; Needham was then to execute his note and deed of trust on the land to Demeter.

The note and deed of trust were drawn by Gilstrap, and bear date January 11, 1881, the same day the money was paid and receipted for, the plaintiff, Walker, being made trustee in the deed of trust. They were delivered to Demeter on the eighteenth day of January, 1881, and recorded the same day. When the money was paid it was understood that the deed for Needham would be returned in about ten days, at which time the note and deed of trust were to be delivered to Demeter. It does not clearly appear when this deed was executed and returned to Macon from Hannibal, but it bears date January 28, 1881, that is, the deed from the company to Needham, and the same was at the time duly recorded, some ten days after the filing of Demeter's deed of trust. The deed and deed of trust bear different dates, but this discrepancy, if one, is fully explained by the witness, Walker. They were intended to be parts of the same transaction. Gilstrap drew the note and deed of trust on the day the money was paid in anticipation of the deed. The company did not make the deed on the day the money was received, but held it until conveyance day. The deed was due on the day of payment, but the company only made deeds once or twice a month.

Long after the plaintiff's deed of trust was recorded, to wit, on the 3d of March, 1883, the land in question was sold under the deed of trust from Needham to ⁶⁴⁰Yale, and the defendant, Wilcox, became the purchaser at the price of six hundred and fifty dollars, as he testifies, and received a trustee's deed, having no other claim, right, or title. At the sale of the property, under the Yale deed of trust, and before he bid on and purchased the same, the defendant, Wilcox, was notified and warned of plaintiff's deed of trust, and for what purpose it was given, and of plaintiff's claim, right, title and interest in and to the property, fully as set out in plaintiff's petition. This notice was given by plaintiff's agent and attorney on the day of sale, before the bidding commenced. This was admitted by the defendant in his cross-examination as a witness in the cause.

The plaintiff prays the court to adjudge as between the rights and equities of the Yale and Demeter deeds of trust, and to declare and adjudge the lien of plaintiff prior and superior to the deed of trust under which the defendant purchased and holds, and, if not paid, that the premises be sold for the payment and satisfaction thereof. There is scarcely any dispute about, or conflict in, the evidence; none at all as to the deeds, deeds of trust, and other documentary evidence, nor of the contents and filing of the same for record. The court decided the law of the case against the plaintiffs, and rendered judgment for the defendant, to reverse which the plaintiffs bring the case to this court by appeal, after an unsuccessful motion for new trial and in arrest.

The vital question in this case is as to which one of the two deeds of trust, that of the plaintiff or the one under which defendant claims title has the prior equity. It is well-settled law that a person cannot acquire a lien upon land purchased by another by the voluntary and unauthorized payment of the purchase money therefor: *Truesdell v. Callaway*, 6 Mo. 605. Nor can he by simply paying the debt due the vendor ⁶⁴¹ who has a lien for the purchase money be subrogated to such vendor's lien: *Nichol v. Dunn*, 25 Ark. 129. Something more is required.

If, however, a part or all of the purchase money remains unpaid, and a person advances the money with which to liquidate the debt at the request of the debtor, with the understanding and agreement with him that he is to have a mortgage on the land to secure him in the payment of the purchase money, the mortgage to be executed as soon as the money is paid, and a deed executed by the vendor, and in pursuance of this agreement the money is paid, the deed made, and the mortgage executed, and delivered to the lender, then it becomes one and the same transaction, and the mortgage thus given will take precedence of all other liens or encumbrances.

It is very evident from the evidence in this case that the deed by the railroad company to Needham, and the mortgage by him to Demeter, were intended by the parties to be concurrent acts, and should therefore be construed as one act, although there was a few days' difference in their respective dates. But this is explained by the witness Walker, who had been agent of the railroad company, and who says that the note and mortgage were written and signed the day upon which the money was loaned, and sent to the company in

payment for the land, but the custom of the company was not to execute deeds oftener than once or twice a month, and this, he states, accounts for the discrepancy in the dates, which in this case, and under the facts and circumstances, are not material.

In the case of *Moring v. Dickerson*, 85 N. C. 466, it is held, that "Where a mortgage on land is given to one who has advanced the purchase money therefor, and executed at the same time with the deed which confers ⁶⁴² title on the mortgagor, the making of the two deeds is considered but one transaction; the seisin of the mortgagor is but an instantaneous one, to which prior encumbrances on his estate will not attach; but the mortgage to secure the purchase money will take precedence of all other liens or encumbrances": *Curtis v. Root*, 20 Ill. 53; *Haywood v. Nooney*, 8 Barb. 648; *Bolles v. Carli*, 12 Minn. 113; *Bradley v. Byran*, 43 N. J. Eq. 396.

So it was held in the case of *Kaiser v. Lembeck*, 55 Iowa, 244, that a mortgage given to a third person who furnishes the money with which the property is purchased is entitled to the same protection as though it were executed to the vendor.

It has also been held that if a third person advances the purchase money, and the purchaser, at the same time the deed is given to him, executes a mortgage to such third person on the same land, to secure the money so advanced, such mortgage is entitled to the same preference over a prior judgment against the purchaser on the land as the vendor himself would have had, if the mortgage had been given directly to him: 2 Pomeroy's Equity Jurisprudence, sec. 725; *Thomas v. Bridges*, 73 Mo. 530; *Carey v. Boyle*, 53 Wis. 574. In some of the states such is the rule as provided by statute.

It has also been held that a mortgage given to secure the payment of the purchase money of land, given at the same time with the deed of conveyance, or in pursuance of agreement as a part of the same transaction, although not executed by the wife, takes precedence over her dower right in the same land: 2 Pomeroy's Equity Jurisprudence, sec. 725, and authorities cited. This right is perhaps looked upon with as much or more favor, and regarded with more jealousy, ⁶⁴³ by the law and the courts than any other rights or interest in landed property.

The lien of the railroad company passed to, and vested in, the plaintiff just as if the company had deeded it to Needham and he had then executed a mortgage to it to secure the

payment of the purchase money, and the company had afterwards assigned the mortgage to plaintiff.

The authorities cited by counsel for defendant do not sustain his contention, and are not in conflict with the views herein expressed. In the case of *Wooldridge v. Scott*, 69 Mo. 669, the contract was not executed, was verbal, and the defense of the statute of frauds was successfully interposed as a defense. In fact, none of them are bottomed on facts like the case in hand.

At the time Needham gave Yale the deed of trust to secure him in the payment of the five hundred dollars, he only had an equity in the land, and was holding the same under a contract of purchase from the railroad company, to whom he owed a part of the purchase money. The defendant purchased nothing more than the interest which Needham had in the land at the time of the execution of the Yale mortgage. Demeter did nothing to impair the rights or interest of Yale, and only advanced the balance of the purchase money at the earnest solicitation of Needham, and succeeded to the rights and lien of the vendor by contract. He was not a mere volunteer in the payment of the money, to whom the law would afford no relief. Even though plaintiff should be held to have the prior equity, defendant loses nothing by reason thereof, for at the time the Yale deed of trust, under which he claims title was executed, the money which plaintiff advanced was unpaid and was a prior lien on the land to this and all other deeds of trust, and which he would have ⁶⁴⁴ been required to pay before obtaining a deed from the railroad company.

We are clearly of the opinion that plaintiff has the prior equity. The cause is reversed and remanded, to be tried in conformity with this opinion. All concur.

SUBROGATION.—A MERE VOLUNTEER IS NOT ENTITLED TO: *Kliemann v. Giesemann*, 114 Mo. 437; 35 Am. St. Rep. 761, and note; *Riggins v. Hilliard*, 56 Ark. 476; 35 Am. St. Rep. 113, and note. See the notes to *Backer v. Pyne*, 20 Am. St. Rep. 237, and *Regan v. New York etc. R. R. Co.*, 25 Am. St. Rep. 320, where the cases are collected.

MORTGAGES FOR PURCHASE MONEY—PRIORITY.—Purchase money is the first lien on land, and a mortgage given to secure money advanced to pay such purchase price takes precedence to a prior recorded mortgage of said property: *Balen v. Mercier*, 75 Mich. 42; or a prior judgment against such purchaser: *Laidley v. Aiken*, 80 Iowa, 112; 20 Am. St. Rep. 403, and note; *Stewart v. Smith*, 36 Minn. 82; 1 Am. St. Rep. 651, and note.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

OSKAMP v. GADSDEN.

[36 NEBRASKA, 7.]

EVIDENCE, TELEPHONE, CONVERSATIONS BY AID OF OPERATOR.—An operator of a telephone called upon to conduct a conversation between two parties becomes thereby the agent of both, and what he repeats to one as being said by the other is admissible in evidence against the latter, and is not hearsay. It is competent, because it is the declaration of an agent made during the progress of a transaction in which he represents his principal.

Isaac Adams, for the plaintiffs in error.

Richmond and Legge, for the defendant in error.

* NORVAL, J. Plaintiffs in error brought suit in the court below to recover damages for the alleged breach of contract by the defendant * in his refusing to deliver a quantity of hay claimed to have been purchased by them from him. The jury returned a verdict for defendant, upon which judgment was entered.

In 1888 plaintiffs were engaged in the city of Omaha in the flour, feed, grain, and hay business. Defendant resided at Schuyler, and had about 150 tons of bailed hay which he desired to sell. Prior to the middle of April of that year plaintiffs and defendant had some correspondence about the purchase and sale of this hay, but no contract was entered into at that time. On May 1, 1888, defendant sent the following letter to plaintiffs:

“Oskamp, Haines & Co., Omaha, Neb.,

GENTLEMEN: What is your price for pressed hay now? Mine is still for sale if I can get as much as others are get-

ing. I would rather close out the entire amount at once if I can find a customer, and will give the use of my barn till July 14th if buyer wants to speculate. There is scarcely any hay left here. Some on the prairie will not be hauled this season on account of bottoms being covered with water.

"Yours truly,

JAMES GADSDEN."

In answer to the above plaintiffs wrote defendant as follows:

"OMAHA, May 2, 1888.

"Mr. James Gadsden, Schuyler, Neb.,

DEAR SIR: Answering yours of the 1st. The market seems to be glutted now with hay. Have bought some at \$7.75 on track since we bought that of yours. If you want to sell now and mean business, we will give you \$8.25 per ton on track here, if it is all like the cars we had, but we do not leave this offer open longer than Saturday, but we prefer acceptance by wire, as we are figuring upon 800 tons at a trifle better price. Sample car now coming, and if we get that all, have got to crowd the market here. Have about 140 tons bought now, and would not want yours at any price with that large lot.

¹⁰ "We would not take the risks of your barn an hour, and you could ship it all as fast as you pleased, having storage for 500 tons. Our full storage capacity here is 1,000 tons. Now, about weights, you can have anyone weigh it here after testing our track scale, or we will pay you by the bale.

OSKAMP & HAINES."

On May 4th defendant called at the telephone office in Schuyler and requested the operator to call up plaintiffs, as he desired to talk to them. Plaintiffs have a telephone in their office and Mr. Haines, one of the firm, answered the call, but owing to the condition of the atmosphere the line was not working well, so that the parties were unable to communicate directly with each other. The telephone operator at Fremont, an intermediate station between Omaha and Schuyler, proposed to, and did, transmit defendant's message to plaintiffs, and repeated their answer to the defendant. The entire conversation was carried on through the assistance of the operator at Fremont, she repeating the message of each party. It is agreed that a contract was entered into at that time by telephone, but there is a conflict in the evidence as to its terms. The plaintiffs introduced testimony tending to show that defendant sold his entire lot of hay at \$8.25 per ton on

track in Omaha, to be shipped two carloads per day. On the other hand, the testimony of the defendant goes to show that plaintiffs' proposition contained in their letter of May 2d was not accepted by the defendant, but that the contract was for only two carloads. Two carloads of hay only were shipped to, and received by, plaintiffs. Subsequently defendant brought an action against plaintiffs to recover for said two carloads of hay, in which Gadsden recovered the full amount claimed, which judgment plaintiffs in error have paid. The burden was upon the plaintiffs to establish the contract and breach of the same, substantially as alleged by them. The jury passed upon the conflicting testimony, and found that the terms of the contract respecting the quantity ¹¹ of the hay sold were as claimed by the defendant. We are satisfied that there is not such a preponderance of the evidence in the plaintiff's favor as to justify us in disturbing the finding.

Error is assigned because the court admitted the testimony of the defendant as to the conversation over the telephone between the witness and Mr. Haines, one of the plaintiffs, as repeated over the wire by Mrs. Cummings, the telephone operator at Fremont. It is contended that the testimony of the witness, of what the operator repeated to him as the conversation progressed, as being said by Mr. Haines, is irrelevant and hearsay. The question thus presented is a new one to this court, and there are but few decided cases which aid us in our investigation. Upon principle, it seems to us that the testimony is competent, and its admission violated no rule of evidence. It was admissible on the grounds of agency. The operator at Fremont was the agent of defendant in communicating defendant's message to Haines, and she was also the latter's agent in transmitting or reporting his answer thereto to defendant. The books on evidence, as well as the adjudicated cases, lay down the rule that the statements of an agent within the line of his authority are admissible in evidence against his principal. Likewise it has been held that when a conversation is carried on between persons of different nationalities through an interpreter the statement made by the latter at the time the conversation occurred as to what was then said by the parties is competent evidence, and may be proven by calling persons who were present and heard it. This is too well settled to require the citation of authorities. There are certainly stronger reasons for holding the statement made by the operator and testified to by defendant is admis-

sible than in the case of an interpreter. Both Haines and defendant heard and understood the operator at Fremont, and knew what she was saying, or at least could have done so. Each knew whether ¹² his message was being correctly repeated to the other by the operator. Not so where persons converse through an interpreter. If the testimony objected to was incompetent and hearsay, then the testimony of Haines relating to the same conversation should, for the same reason, have been excluded. He did not hear what defendant said, but testified to what the operator reported as having been said. The operator at Fremont was not the agent of the defendant alone, but she was plaintiff's agent in repeating their answer to defendant's message.

That conversations held through the medium of telephone are admissible as evidence in proper cases cannot be doubted. Such have been the holdings of the courts in cases where the question has been before them. In a criminal case, *People v. Ward*, 8 N. Y. Crim. Rep. 483, it was held that where a witness testifies that he conversed with a particular person over the telephone and recognized his voice, it was competent for him to state the communication which he made.

In *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, it was ruled that if the voice was not identified or recognized, but the conversation is held through a telephone kept in a business house or office, it is admissible, the effect or weight of such evidence, when admitted, to be determined by the jury: See *Globe Printing Co. v. Stahl*, 23 Mo. App. 451.

A case quite analogous to the one at bar is *Sullivan v. Kuykendall*, 82 Ky. 483; 56 Am. Rep. 901. In that case the parties did not have conversation directly with each other over the telephone, but conversation was conducted by an operator in charge of a public telephone station at one end of the line. It was held that the conversation was admissible in evidence and that it was competent for the person receiving the message to state what the operator at the time reported as being said by the sender. The court in the opinion says: "When one is using the telephone, if he knows that he is talking to the operator, he also knows that he is making him ¹³ an agent to repeat what he is saying to another party; and, in such a case, certainly the statements of the operator are competent, being the declarations of the agent, and made during the progress of the transaction. If he is ignorant whether he is talking to the person with whom he wishes to

communicate or with the operator, or even any third party, yet he does it with the expectation and intention on his part that in case he is not talking with the one for whom the information was intended it will be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he may have said. This should certainly be the rule as to an operator, because a person using a telephone knows there is one at each station whose business it is to so act; and we think that the necessities of a growing business require this rule, and that it is sanctioned by the known rules of evidence."

Our conclusion is that the court did not err in admitting the testimony of the defendant.

It is claimed that the court erred in refusing certain instructions requested by the plaintiff, but as they raise the same question we have been considering, the objections will be overruled without further comment. The judgment below is affirmed.

The other judges concur. _____

EVIDENCE.—CONVERSATION BY TELEPHONE: See the extended note to *Central etc. Tel. Co. v. Falley*, 10 Am. St. Rep. 135. Conversations by telephone when pertinent are admissible in evidence: *Missouri Pac. Ry. Co. v. Heidenheimer*, 82 Tex. 195; 27 Am. St. Rep. 861, and note; *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473; 10 Am. St. Rep. 331; *Reed v. Burlington etc. Ry. Co.*, 72 Iowa, 166; 2 Am. St. Rep. 243. The case of *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901, is very similar to the leading case. It was therein held that a telephone message through an operator was admissible in evidence.

CITY OF OMAHA v. JENSEN.

[85 NEBRASKA, 68.]

MUNICIPAL CORPORATIONS—LIABILITY OF FOR CONDITION OF STREETS.—

Notice to a municipality of the condition of a street is not a condition precedent to its liability to a person injured thereby when such condition necessarily resulted from work which the city had employed a contractor to do, though he had agreed to maintain proper guards and signals, and had failed to do so, and thereby caused an accident. Thus, if a city causes a cistern to be dug in a street, which is left open and unguarded, it cannot exonerate itself from liability by proving that the person employed to do such digging had agreed to keep guards and signals at the excavation. A city cannot surrender its control over its streets so as to relieve itself from liability.

INDEPENDENT CONTRACTOR, LIABILITY FOR ACTS OF.—When work to be performed is necessarily dangerous, and an obligation rests on the em-

ployer to keep the place of the work in a safe condition, he is answerable for injury resulting from the dangerous condition in which the work is left, though it is being done for him by an independent contractor.

EVIDENCE.—TESTIMONY OF A WITNESS TAKEN AT A FORMER TRIAL may be read in evidence from the stenographer's notes if such witness is absent from the state.

A. J. Poppleton, for the plaintiff in error.

Connell and Ives, for the defendant in error.

10 **MAXWELL, C. J.** The defendant in error brought an action against the city of Omaha to recover for personal injuries caused by falling into an excavation in that city, which was negligently left without guards or other protection. The city pleads two defenses: 1. That the injury was caused by the negligence of the party injured; and 2. That the sewer trench described in plaintiff's petition was at said date being constructed under a contract made to the lowest bidder as provided and required by the charter of the city of Omaha in that regard, and under and by virtue of the terms of said contract the contractor was to erect and maintain the necessary guards, signals, and protection on and around said work, so as to prevent the danger of accidents to travelers upon the street, and that under and by virtue of the terms of said contract, the defendant, the city of Omaha, had nothing whatever to do with the maintaining of such guards, signals, and protections, and the defendant further saith that it had no knowledge, directly or otherwise, that the contractor was not maintaining the necessary and proper guards, signals, or protection, and that the defendant did not have notice that such signals, guards, or protections were not maintained by said contractor." On the trial of the cause the jury returned a verdict in favor of Mrs. Jensen for the sum of two thousand dollars, on which judgment was rendered.

It is contended, first, that the city was not liable, for the reason that the proof shows that it had expressly stipulated with the contractor that he should place guards around the excavation, and that it had no actual notice of his failure to supply them, and that the danger had not existed a sufficient
11 length of time to charge the city with the implied notice.

The attorney for the city thereupon requested the court to give the following instruction: "The jury are instructed that under the terms and conditions of the contract, introduced in evidence by the defendant, under which the sewer was being

constructed, the city is not liable in damages to the plaintiff for the failure of the contractor to place or maintain guards or signals, unless you find from the evidence that the city, by and through its officers, had actual knowledge that guards or signals were not put up over the sewer as a warning to travelers on that part of the street. Whereas this sewer trench had been dug on the very day of the happening of the accident, you are instructed, as a matter of law, that the want of signals or guards upon that evening had not existed for a sufficient length of time to constitute constructive or presumptive notice to the city that the sewer was left unguarded and unprotected, so there could be no recovery in this case unless the plaintiff has proven that the city, through its proper officers, did have actual knowledge that the contractor had omitted to put up the proper signals or guards, and that after such knowledge had come to the officers or its proper agents, they had length of time to see that the same were put up before the accident happened. You are further instructed that the plaintiff does not claim to have introduced any evidence to prove that any officers of the city of Omaha had any actual knowledge that guards and signals were not put up by the sewer trench, you should therefore find for the defendant." This the court refused to give, to which exceptions were duly taken. In this there was no error. Where the injury is the result of the work itself, however skillfully performed, and not in the manner of performance, the city will be liable for an injury sustained by a party in the exercise of due care; in other words, where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees or is authorized ⁷² to do, the person who causes the obstruction or defect will be liable. Thus, suppose the city caused a ditch to be dug across the street, and the same should be left open and unguarded, the city cannot plead as a defense that the contractor agreed to keep guards around the excavation, because it cannot surrender its control of the streets so as to relieve it from liability: *Palmer v. City of Lincoln*, 5 Neb. 136; 25 Am. Rep. 470; *McAllister v. Albany*, 18 Or. 426; *Storrs v. Utica*, 17 N. Y. 108; 72 Am. Dec. 437; *Robbins v. Chicago*, 4 Wall. 679; *Circleville v. Neuding*, 41 Ohio St. 469.

In the case last cited it is said: "The relation between the city and Barndt was clearly that of employer and independent contractor, and the rule is generally that for injuries occurring in the progress of work carried on by parties in that

relation, the contractor alone is liable. But this liability is limited to those injuries which are collateral to the work to be performed, and which arise from the negligence or wrongful act of the contractor or his agents or servants. Where, however, the work to be performed is necessarily dangerous, or the obligation rests upon the employer to keep the subject of the work in a safe condition, the rule has no application. This distinction has been taken in this state in a number of cases: *Carman v. Steubenville etc. R. R. Co.*, 4 Ohio St. 399; *Tiffin v. McCormack*, 34 Ohio St. 638; 32 Am. Rep. 408; *Hughes v. Railway Co.*, 39 Ohio St. 461; and elsewhere in *McCafferty v. Spuyten etc. R. R. Co.*, 61 N. Y. 178; 19 Am. Rep. 267; *Prentiss v. Boston*, 112 Mass. 48; *City of Logansport v. Dick*, 70 Ind. 65; 36 Am. Rep. 166; *Crawfordsville v. Smith*, 79 Ind. 308; 41 Am. Rep. 612; *Robbins v. Chicago*, 4 Wall. 657.

In this case the cistern contracted for was to be built in a street, and to be eighteen feet wide and twenty feet deep. Such an excavation in a street, unless protected to guard persons and animals using the street from falling into it, was necessarily dangerous. The city was under the statutory obligation at the time of the accident to keep its streets open, in repair, and free from nuisance, and it could not ⁷² cast this duty upon a contractor, so as to relieve itself from liability to one who should receive an injury. It is primarily liable for an injury resulting from such dangerous place in a street. No doubt a city may require a contractor to indemnify it against loss for damages caused by his negligence in the performance of the work, but that question is not before us.

2. It is claimed the city is not liable, because it had no notice, either actual or constructive. In a case of this kind no notice is necessary. The city had authorized the excavation in question, and it was its duty to see that the proper guards were placed around it.

3. It is claimed that the court erred in admitting the testimony of Nels Christensen. It appears from the record that Christensen's testimony had been taken by the court's stenographic reporter on a former trial of this case. This testimony was objected to "for the reason that no sufficient cause has been shown for reading that testimony." The objections were overruled and the testimony admitted. In this it is claimed there is error, and we are referred to the case of *Spelman v. Flynn*, 19 Neb. 342. In that case it was held that a

certified copy of the stenographic reporter's record of proceedings in the district court is admissible in all cases where the original would be. That, we think, is a correct statement of the law on that point. In the case at bar Christensen is shown to have been absent from the state, and his testimony on a former trial, if otherwise unobjectionable, is admissible. The objection is not to the mode of certifying the evidence. Had it been, as the stenographic reporter was present in court, no doubt he would have made the proper certificate. The objections were properly overruled. There is no error in the record, and the judgment is affirmed.

The other judges concur. —

MUNICIPAL CORPORATION—DEFECTS IN STREETS—NECESSITY FOR NOTICE OF.—In an action brought by a person injured by the neglect of a city to properly guard a place in a street made dangerous by its own act it is not necessary to prove notice to it of the defect: *Wilson v. City of Troy*, 135 N. Y. 96; 31 Am. St. Rep. 817, and note; *Nesbitt v. Greenville*, 69 Miss. 22; 30 Am. St. Rep. 521, and extended note; extended note to *Goddard v. Inhabitants etc.*, 30 Am. St. Rep. 385; note to *Mayor v. Wilson*, 14 Am. St. Rep. 152.

MUNICIPAL CORPORATIONS—WHEN LIABLE FOR ACTS OF INDEPENDENT CONTRACTOR.—A city is liable to a person injured from the negligent act of its contractor, if the contract required the performance of work which was intrinsically dangerous: *Village of Jefferson v. Chapman*, 127 Ill. 438; 11 Am. St. Rep. 136, and note; *City of Joliet v. Harwood*, 86 Ill. 110; 29 Am. Rep. 17, and extended note. This question will be found thoroughly discussed in the extended notes to *Farguar v. Roseburg*, 17 Am. St. Rep. 735; *Detroit v. Beckman*, 22 Am. Rep. 510; and *St. Paul v. Selts*, 74 Am. Dec. 761.

EVIDENCE—TESTIMONY OF WITNESS AT FORMER TRIAL.—The testimony of a witness taken at a former trial of a cause may be read in evidence on a subsequent trial if he is shown to reside beyond the jurisdiction of the court: *Dunbar v. McGill*, 69 Mich. 297; *Love v. State*, 86 Ala. 47; *Hudson v. Ross*, 76 Mich. 173; or is dead: *Jackson v. State*, 81 Wis. 127; but it is not competent for proof to be made of the purport or effect of the testimony on a former trial of absentees from the state: *State v. Oliver*, 43 La. Ann. 1003. This question is discussed at length in the notes to the following cases, where the cases in this series will be found collected: *Bergen v. People*, 65 Am. Dec. 676-679; *Wagers v. Dickey*, 49 Am. Dec. 471; *Emery v. Fowler*, 63 Am. Dec. 632; *Mineral Point R. R. Co. v. Keep*, 74 Am. Dec. 133; *Commonwealth v. Richards*, 29 Am. Dec. 611; *Crary v. Sprague*, 27 Am. Dec. 116; and *Magill v. Kauffman*, 8 Am. Dec. 717.

MISSOURI PACIFIC RAILWAY CO. v. TWISS.

[35 NEBRASKA, 267.]

CARRIERS.—SEVERAL COMMON CARRIERS FORMING A CONNECTING LINE for the transportation of property beyond the limits of their respective lines are agents of one another to accomplish the carriage and deliver the goods.

CARRIERS.—IF ONE OF SEVERAL CONNECTING CARRIERS IS GUILTY OF NEGLIGENCE whereby property is injured, and the owner recovers for such injury of the carrier receiving the goods from him, the latter is entitled to be compensated by the negligent carrier for the recovery thus suffered through his fault.

JUDGMENT.—WHEN BINDING UPON A THIRD PERSON.—Where a party knows that an injury for which an action is brought against another was caused by himself, and that no recovery can be had therein, unless for his neglect or wrong, he is bound by the judgment which may be entered in such action, if he had knowledge of its pendency and could have defended had he so desired. In a subsequent action against him by the judgment defendant the measure of damages is the amount of such judgment with interest and costs.

B. P. Waggener and A. N. Sullivan, for the plaintiff in error.

Beeson and Root, for the defendant in error.

268 MAXWELL, C. J. It is alleged in the petition, in substance, that during the month of October, 1886, the defendants were common carriers of goods and merchandise from the plaintiff's depot in Louisville, Nebraska, to the depot of the Chicago, Burlington, and Quincy Railroad, in said village, about the distance of one mile; that on the eleventh day of that month one J. P. Young shipped a piano from Weeping Water on the line of plaintiff's railroad to be carried to Louisville and there delivered to the Chicago, Burlington, and Quincy Railroad, to be transported on the latter road to Platts-mouth; that the defendants received freight in less than car-load lots from the plaintiff at its depot in Louisville to be by them carried to and delivered to the Chicago, Burlington, and Quincy Railroad at its depot there; that they were in fact an intermediate transportation company; that the plaintiff fully performed all the conditions of said contract on its part and delivered said piano in good condition to the defendants at Louisville, to be transported by them to the depot of the Chicago, Burlington, and Quincy Railroad 269 at that place to be forwarded to Platts-mouth; that the defendants so negligently performed their duty in transferring said piano as to permit the same to fall out of the vehicle on which it was being car-

ried, and it was thereby broken and damaged; that said Young thereupon brought suit against the plaintiff for said injuries, and recovered a judgment against plaintiff for the sum of one hundred and fifty dollars and costs of suit taxed at sixty-three dollars and five cents; that said judgment was affirmed by the supreme court; that of all said suits and proceedings the defendants had due notice; that there is due from the defendants to the plaintiff the sum of three hundred and two dollars and forty-eight cents, with interest from the fourth day of April, 1889.

The answer of the defendants consists of a number of specific denials, which need not be noticed.

On the trial of the cause the jury returned a verdict in favor of the plaintiff for the sum of one hundred and six dollars and seventy-five cents upon which judgment was rendered.

The testimony shows that the plaintiff, in connection with other common carriers, undertook to carry the piano beyond its own line and deliver the same to Young; in other words, several common carriers in effect formed a line for the transportation of the property beyond the limits of their respective lines, and gave in this case a through bill of lading. In such case each carrier is the agent of the others to accomplish the carriage and delivery of the goods: *Baltimore etc. R. R. Co. v. Campbell*, 36 Ohio St. 647; 38 Am. Rep. 617; *Beard v. St. Louis etc. Ry. Co.*, 79 Iowa, 527; *Atchison etc. R. R. Co. v. Roach*, 35 Kan. 740; 57 Am. Rep. 199; *Kansas etc. R. R. Co. v. Rodebaugh*, 38 Kan. 49; 5 Am. St. Rep. 715; *Texas etc. R. Co. v. Fort*, 1 Tex. Ct. App. (Civ. Cas.) 722.

That the piano was injured by the negligence of the defendants is not denied, and is clearly shown by the proof. In such case the party sustaining the injury may bring his action directly against the carrier committing the injury, or against the one that undertook to transport the goods: *Atchison etc. R. R. Co. v. Roach*, 35 Kan. 740; 57 Am. Rep. 199; *Union Pac. Ry. v. 270 Marston*, 30 Neb. 241. As between the carriers, however, each one is liable for the results of its own negligence, and although the first carrier may have assumed the responsibility for the transportation of property beyond its own line, and damages may be recovered against it for a failure in that regard, yet the carrier causing the injury will be liable to it for such damages; in other words, the party guilty of the wrong is ultimately liable therefor. This doc-

trine, in another form, has frequently been applied where a covenantee has been evicted from possession by a paramount title: *Smith v. Compton*, 3 Barn. & Adol. 407; *Williamson v. Williamson*, 71 Me. 442; *Bever v. North*, 107 Ind. 544; *St. Louis v. Bissell*, 46 Mo. 157; *Wendel v. North*, 24 Wis. 223; *Mason v. Kellogg*, 38 Mich. 132; 2 Black on Judgments, sec. 567.

In *Bever v. North*, 107 Ind. 544, it was held that it was unnecessary to allege in the petition that the covenantor was required to defend. It was held that the covenantee need not appeal from the judgment of ouster, but might rely on his judgment. In this class of cases it is necessary to give notice to the covenantor in order that the judgment may be conclusive against him, and he should not only be notified of the action, and be requested to defend it, but if he desires should be allowed to do so to the utmost extent of the law: *Eaton v. Lyman*, 26 Wis. 61.

The above rules have been applied to cases where persons are responsible over to another either by express contract or operation of law. Thus, where damages were recovered against a sheriff for the escape of a prisoner caused by its failure to provide a jail, and he in turn sued the county for its neglect in that regard, it was held that the record of the judgment against the sheriff might be received in evidence against the county to show the amount he was compelled to pay: *Commissioners v. Butt*, 2 Ohio, 348. So, where a judgment has been recovered against a municipal corporation for injuries caused by an obstruction or defect ²⁷¹ in the public road or street, of which the wrongdoer has notice, is conclusive evidence of the obstruction or defect in the road or street, the injury to the individual, and the amount of damages: *Milford v. Holbrook*, 9 Allen, 17; 85 Am. Dec. 735; *Boston v. Worthington*, 10 Gray, 498; 71 Am. Dec. 678; *Davis v. Smith*, 79 Me. 351; *Littleton v. Richardson*, 34 N. H. 187; 66 Am. Dec. 759; *Robbins v. Chicago*, 4 Wall. 657.

Where the action is brought against a municipality for a wrong committed by a third person by reason of which the municipality is liable, and judgment is recovered against it, it has been held in a number of cases that it was sufficient if the wrongdoer knew that the suit was pending for that cause, and he could have made his defense if he so desired. It is said in one case: "The legal presumption is that he knew he was answerable over to the corporation, and if so, it must also be presumed that he knew he had a right to defend the suit":

Robbins v. Chicago, 4 Wall. 657; *Chicago v. Robbins*, 2 Black, 418. In other words, where the wrong for which the city was sued was committed by the defendant alone, and if a judgment is recovered against it, it will be because of such wrong. The knowledge of the wrongdoer that an action is pending to recover for the injury is sufficient notice to him to justify his action, and if possible prevent a recovery, and that if judgment is recovered he will ultimately be liable.

In the case at bar the defendant Twiss was called as a witness in both the county and district courts. He recognized his liability for the damages, both before and after suit was brought, by endeavoring to effect a settlement of the same. It is true the proof fails to show an actual request to defend the action, but as he and his partner had committed the injury, they must have known they were ultimately liable for the same, and the plaintiff had an action over against them. Having this knowledge, it was their duty to defend the action if such defense they had. There is a material difference between a case like the one ³⁷² at bar and one where an action is brought by a covenantee against his covenantor. There the nature of the covenant claimed to have been broken, as well as the existence of the covenant itself, may be in issue, as well as the claim of the plaintiff. So if an action is brought against a municipality for an injury from a defective sidewalk, which it was the duty of the lot-owner to maintain in good repair, notice may be required because the lot-owner may be presumed to have no knowledge of the injury, or that it occurred on his premises, or even that the sidewalk was defective. Where, however, the party knows that the injury was caused by himself and no one else, and that if a recovery is had it will be because of his neglect and wrong, it is sufficient that he has knowledge of the pendency of the suit, and could defend if he so desired: *Chicago v. Robbins*, 2 Black, 418; *Robbins v. Chicago*, 4 Wall. 657, 672.

The case was tried upon the theory that the defendants were not bound by the amount of the judgment, and the instructions are based on that view of the law. The measure of damages which the plaintiff is entitled to recover is the amount of the judgment against it with interest and costs: *Ottumwa v. Parks*, 43 Iowa, 119. The judgment of the district court is reversed and the cause remanded for further proceedings. Reversed and remanded.

The other judges concur.

CONNECTING CARRIERS AS AGENTS OF ONE ANOTHER: See *St. Louis etc. Ry. Co. v. Weakly*, 50 Ark. 397; 7 Am. St. Rep. 104, and note; *Gulf etc. Ry. Co. v. Looney*, 85 Tex. 158; 24 Am. St. Rep. 787; note to *Adams Express Co. v. Harris*, 16 Am. St. Rep. 319, and the extended note to *Wells v. Thomas*, 72 Am. Dec. 232.

JUDGMENTS—WHEN BINDING ON THIRD PERSONS.—A judgment for damages for negligence is conclusive in an action brought to recover the amount paid pursuant thereto from the one ultimately liable: *Oceanic etc. Nav. Co. v. Compania Transatlantica Española*, 134 N. Y. 461; 30 Am. St. Rep. 685; *Inhabitants etc. v. Holbrook*, 9 Allen, 17; 85 Am. Dec. 735; *Boston v. Worthington*, 10 Gray, 496; 71 Am. Dec. 678, and note; *Littleton v. Richardson*, 24 N. H. 179; 66 Am. Dec. 759, and note.

PARTY COMPELLED TO PAY DAMAGES FOR ANOTHER'S NEGLIGENCE IS ENTITLED TO INDEMNITY: *Oceanic etc. Nav. Co. v. Compania Transatlantica Española*, 134 N. Y. 441, 30 Am. St. Rep. 685, and note with the cases collected. See also the extended note to *Village of Cartersville v. Cook*, 16 Am. St. Rep. 250.

NORTON v. NEBRASKA LOAN AND TRUST COMPANY.

[35 NEBRASKA, 466.]

JUDICIAL SALES, VACATING FOR MISREPRESENTATION OF OFFICERS.—The fact that the sheriff and clerk of the court represented that a purchaser of land which the former was offering for sale under a judgment would obtain a perfect title, and thereby induced a purchaser to bid, does not entitle him to have the sale set aside, on proof that the land was subject to a paramount lien, and that he and they were mistaken in believing that the sale would cut out such lien, when none of the parties to the action united in, or knew of, such representation. It was the duty of the purchaser to ascertain for himself the character of the title he was about to acquire, and he had no right to rely upon the statements of the clerk and the sheriff, especially when an examination of the proceedings in the case would have disclosed the true condition of the title.

JUDICIAL SALES.—AFTER A BID IS ACCEPTED, an officer making a judicial sale has no power to release the bidder.

S. S. McAllister, for the plaintiff in error.

Steele Brothers, for the defendant in error.

468 NORVAL, J. The Nebraska Loan and Trust Company brought suit in the district court of Butler county against Byron E. Taylor and Lila A. Taylor, his wife, to foreclose a mortgage upon the south half of section 12, in township 15 north, range 1 east, executed by the Taylors, which mortgage was junior, and subject to a prior mortgage of \$3,000 on said real estate, owned and held by one Washington Quinlin. The court found there was due the loan and trust company on its mortgage the sum of \$1,056.60; that said Quinlin had

the first lien on said premises for \$3,000, with interest thereon at six per cent, from July 1, 1888, and a decree of foreclosure was rendered, which directed the sale to be made subject to the lien of Quinlin. Subsequently an order of sale was issued, and the land, after being duly appraised and advertised, was sold by the sheriff to one W. C. Norton, the plaintiff in error herein, for the sum of \$2,535. The sale was reported by the sheriff to the court, and the same was approved and confirmed. Shortly thereafter, at the same term of court, the purchaser filed a motion to vacate and set aside the sale on the ground that he was induced to purchase the property by reason of certain representations made by the sheriff and the clerk of the district court as to the character of the title the purchaser would acquire. The motion was overruled, and Norton was ordered to pay into court the amount of his bid. To reverse said order Norton prosecutes a petition in error to this court.

449 It appears from the affidavits filed in support of the motion to set the sale aside, that Mr. Norton came to the place where the sheriff was offering the property for sale, and inquired what he was selling, to which the officer replied that it was the B. E. Taylor land, and requested Norton to make a bid thereon; that Norton thereupon asked what amount must be bid to get the land, to which the sheriff replied that under the appraisement it could not be sold for less than \$2,533.60, as that was two-thirds of the appraised value, and that by paying said sum he would acquire a good and perfect title to the land, free from all liens; that the sheriff and Norton then went to the office of the clerk of the district court to ascertain what amount was against the land, and the clerk, after examining the papers, told Norton he would have to bid \$2,533.60 to get the land, but he had better make the bid \$2,535 even, and thereby get a little above two-thirds of the appraised value; that the payment of said sum would clear the land of all prior liens and encumbrances; that relying upon said statements Norton made a bid of \$2,535, and the land was struck off to him at said sum.

On the next day, the sheriff, on meeting Norton, said to him that the amount of his bid was not two-thirds of the appraisement; that the land had been appraised at \$4,800 and could not be sold for less than \$3,200, and that unless Norton would raise his bid to said sum he could not have the land; whereupon Norton replied he would not bid the sum of \$3,200, and the sheriff then stated that such sale must be de-

clared off. It also appears that the statements of the sheriff and clerk were innocently made and without any intention to mislead or deceive the purchaser. It is also shown by uncontradicted testimony that the land was well worth \$6,400.

The object and purpose of the plaintiff in error is to set aside a sheriff's sale on the ground that he did not thereby acquire the title which he at the time supposed he was purchasing. ⁴⁷⁰ No claim is made that either the plaintiff in foreclosure, or, Taylor, or his wife, was guilty of any fraud, or that any representations were made by either of them to Norton, as to the character of the title to the land, or that they had any knowledge at the time of the purchase of the statements and representations made by the clerk and sheriff. The only proposition presented is whether the fact of the sheriff and clerk having represented to Norton that, if he would buy the land, he would get a clear and perfect title thereto, free from liens, although such representations were untrue, was sufficient to require the court to set aside the sale. In our view, under the facts disclosed by this record, and the law applicable thereto, plaintiff in error is not entitled to any relief. Ordinarily a purchaser at sheriff's sale takes all risks. He buys at his peril, and if the title is bad he must stand the loss. The rule of *caveat emptor* applies in all its force to all judicial sales. The court undertakes to sell the title of the defendant, such as it is, and it is the duty of the purchaser to ascertain for himself the character of the title he is about to acquire: *Miller v. Finn*, 1 Neb. 254; *Smith v. Painter*, 5 Serg. & R. 223; 9 Am. Dec. 344; *Vattier v. Lytle*, 6 Ohio, 478; *Lewark v. Carter*, 117 Ind. 206; 10 Am. St. Rep. 40; *Corwin v. Benham*, 2 Ohio St. 36; *Mason v. Wait*, 4 Scam. 127; *Bishop v. O'Conner*, 69 Ill. 431; *Sackett v. Twining*, 18 Pa. St. 199; 57 Am. Dec. 599; *Lynch v. Baxter*, 4 Tex. 431; 51 Am. Dec. 735.

An exception to the rule above stated, recognized by the weight of authorities, is where the purchaser has been induced to bid by fraud, or under a mistake of fact. A purchaser will be released from the sale on the ground of a mistake of fact, when the mistake is not the result of his own negligence, if application therefor is made at the proper time; but he will not be released from his purchase on his mere ignorance or mistake of law: *Haden v. Ware*, 15 Ala. 149; *Burns v. Hamilton*, 33 Ala. 210; 70 Am. Dec. 570; *Hayes v. Stiger*, 29 N. J. Eq. 196; *Upham v. Hamill*, 11 R. I. ⁴⁷¹ 565; 28 Am. Rep. 525. The facts do not bring the case at bar within the ex-

ception to the rule, so as to entitle Norton to have the sale set aside. Neither the clerk nor sheriff misrepresented any material fact concerning the condition of the title. They did not inform the purchaser that there were no encumbrances upon the property, nor does Norton claim that he was not aware of there being a prior mortgage of \$3,000 on the premises at the time he made his bid. The clerk and sheriff supposed that the sale would extinguish all encumbrances, and that the purchaser would acquire a perfect title to the property. In so informing Norton, they misstated the law, or the legal effect of the foreclosure proceedings and sale, and for which the law affords no relief.

We think plaintiff in error is concluded by his own neglect. He had no right to rely upon the statements of the clerk and sheriff, but should have had the title and the proceedings under which the sale was made examined for himself before he made his bid. Had he done so he would have been fully apprised of the condition of the title. The records of the county and of the court are open to inspection to every one, and these records disclose the objection now urged to the title of the lands. Had an examination been made of either the petition to foreclose the mortgage, the decree, the appraisal, certificate of liens, or notice of sale, he would have ascertained that Washington Quinlin had a first lien upon the premises for \$3,000 and interest, and that the sale was to be made subject thereto. If Norton was deceived it was the result of his own negligence in not taking the precaution to examine the records. He is chargeable with knowledge of their contents. Equity will not relieve a purchaser of his own negligence: *Roberts v. Hughes*, 81 Ill. 130; 25 Am. Rep. 270; *Vanscoyoc v. Kimler*, 77 Ill. 151; *Riggs v. Pursell*, 66 N. Y. 193; *White v. Seaver*, 25 Barb. 235; *Eccles v. Timmons*, 95 N. C. 540; *Webber v. Clark*, 136 Ill. 256; *Dennerlein v. Dennerlein*, 111 N. Y. 518.

⁴⁷³ In *Eccles v. Timmons*, 95 N. C. 540, it is held that a purchaser at a judicial sale will not be released from his bid on the ground that the title is imperfect, when the true state of the title is set out in the pleadings under which the sale is made.

Dennerlein v. Dennerlein, 111 N. Y. 518, was a partition sale. The property was described in the proceedings and in the notice of sale by metes and bounds, and as "containing 81 acres, be the same more or less." Prior to the sale hand-

bills were issued in the name of the referee who made the sale, in which the boundary lines of the premises were omitted, and the property was described as "the farm of the late John Dennerlein, containing 81 acres." The purchaser, in bidding upon the property, relied upon the statement in the handbills as to the quantity of land. Subsequently he discovered that the premises only contained $24\frac{1}{2}$ acres, and applied to the court for an order releasing him from completing the purchase on the ground that he had been misled as to the number of acres, which motion was denied. He appealed to the general term, where the order was affirmed, and, on appeal to the court of appeals of New York, it was held that he was not entitled to relief.

Vanscoyoc v. Kimler, 77 Ill. 151, was an appeal from an order of the circuit court sustaining a motion made therein by the purchaser to set aside a sale of a tract of land made upon execution, on the ground that he was led to believe, by misrepresentations made by the officer conducting the sale, that the land was not encumbered, when in fact it was mortgaged in excess of its value. The supreme court held that the maxim of *caveat emptor* applied, and that the misrepresentation of the sheriff afforded no ground for setting aside the sale.

In the case at bar the price paid was so greatly inadequate to the real value of the land as to put the purchaser on inquiry. He should have known that a half section of ⁴⁷⁸ land which the evidence shows was well worth \$6,400, would sell for more than \$2,535, the amount of his bid, if there was no prior encumbrance. The land was actually worth several hundred dollars more than the amount bid by Norton and the Quinlin lien combined, so that, instead of losing anything by the transaction, the investment is still a profitable one. He does not complain that he has lost anything by the transaction, but rather that he failed to double on the investment.

Concerning what took place between the sheriff and Norton the day following the sale, to which reference has been made, we will say that it is unexplainable how the former made the statements he did, if correctly quoted in Mr. Norton's affidavit, in regard to what the land was appraised at. It is not true that it had been appraised at \$4,800, and could not be sold for less than \$3,200. The sum bid by Norton was more than two-thirds the appraised value of the land, as shown by

the appraisement. However, what the sheriff may have said in that regard, as well as the statement that "the sale must be declared off," is of no importance, for the reason that the status of Norton, as purchaser, was fixed when his bid was accepted; the officer had no power or authority to afterwards release him from his purchase.

It is contended that this case falls within, and is controlled by, that of *Paulett v. Peabody*, 3 Neb. 196, and *Frasher v. Ingham*, 4 Neb. 531. We do not think so. These cases were decided upon facts materially different from this. In the first case there was a decree of foreclosure of a junior mortgage, in a suit wherein the senior mortgagee was not a party. The property was sold under the decree by the sheriff, the purchaser being induced to buy the property through the false representations of the attorneys of both the plaintiff and the senior mortgagee, that the junior mortgage would be paid off out of the proceeds of the sale, and that he would take the property discharged ⁴⁷⁴ of such lien. It was held that said false representations of the parties were sufficient grounds for vacating the sale. In the case we are considering it is not pretended that any misrepresentations or fraud can be imputed to any of the parties to the suit, or to Quinlin, the senior mortgagee, whereby Norton was induced to buy the land. Of course, when a fraud is practiced upon the purchaser at a judicial sale by the party in interest, which induced the purchaser to make his bid, the sale will be set aside therefor. But the rule has no application here.

In the case reported in 4 Nebraska the sheriff levied an execution upon, appraised, and sold, a tract of land covered with timber. The sale was duly confirmed and a deed executed to the purchaser. Afterwards it was discovered that the record of the proceedings under the writ described another tract near by, which was of no value whatever. It was held, on a petition of the purchaser to set aside the sale, that he was entitled to relief. Clearly the case is not analogous to the one before us, for in this case there was no error in describing the lands, as in the case cited. The doctrine announced in these decisions should not be extended to cases not clearly of their class.

We are of the opinion that the district court did not err in overruling the motion of the plaintiff in error to set the sale aside, and its decision is affirmed.

Post, J., did not sit. .

MAXWELL, C. J., dissented on the ground that the sale, being conducted by an officer of the court, was in legal effect a sale by the court itself; that any misrepresentation made by the officer, whether innocent or not, was a misrepresentation by the court; that there was not, under the circumstances of the case, any time in which the purchaser could have examined the title, that the doctrine of *caveat emptor* does not apply where misstatements of fact are made by an officer conducting the sale; and the judge finally summed up his views as follows:

"As I understand the law, a court of equity, in making a sale of real estate under a decree of foreclosure, takes the place of the vendor, and the person making the sale is the agent of the court, and it is the duty of the court to see that the sale was fairly conducted in all respects, and that it will not sanction misrepresentations in its agent as to the title of the property, or encumbrances, to induce persons to bid. In other words, misrepresentations which, if made by the landowner himself to a purchaser, would be good ground to set a sale aside, are equally so when made by the person appointed by the court to conduct a sale under a decree; and experience has shown that the establishment of this rule has induced competition in bidding at such sales: *McGowan v. Wilkins*, 1 Paige, 120; *Morris v. Mowatt*, 2 Paige, 586; 22 Am. Dec. 661; *Veeder v. Fonda*, 3 Paige, 94; *Seaman v. Hicks*, 8 Paige 656; *Kaufman v. Walker*, 9 Md. 229; *Tooley v. Kane*, 1 Smedes & M. Ch. 518.

I do not understand that the rule of *caveat emptor* applies where another element intervenes, viz., false representations. It seems to me that great injustice is done to the plaintiff in error, and a rule is established that is liable to be fraught with gross injustice, not only to purchasers at judicial sales, but to the owners of the equity of redemption as well. In my view, the sale should be set aside."

EXECUTION SALES—EFFECT OF MISREPRESENTATIONS OF OFFICER.—Representations made by a deputy sheriff at a sale of personal property that the title is good, will not render the execution plaintiff liable to the purchaser for a failure of title in the absence of proof that the representations were made by his procurement: *Levark v. Carter*, 117 Ind. 206; 10 Am. St. Rep. 40, and note. See the extended note to *Neal v. Gillaspie*, 26 Am. Rep. 33, also the note to *Upham v. Hamill*, 23 Am. Rep. 527.

JUDICIAL SALE.—A commissioner may withdraw land from sale after it has been offered and even after a bid has been received and cried: *Miller v. Law*, 10 Rich. Eq. 320; 73 Am. Dec. 92, and note.

JOHNSON v. TORPY.

[35 NEBRASKA, 604.]

CONTRIBUTION BETWEEN WRONGDOERS.—In determining whether a right of contribution exists in favor of one wrongdoer against another, the test is, must the party demanding contribution be presumed to have known that the act for which he has been compelled to respond was wrongful? If so, he cannot recover.

CONTRIBUTION BETWEEN PERSONS LIABLE FOR WRONGFUL SALE OF INTOXICATING LIQUOR.—If two persons are licensed saloon keepers in the same town, and have given bonds as such, and a recovery is had against one of them and his sureties for causing the death of a human being by

selling him such liquors, he cannot enforce contribution of the other saloon keeper and his sureties, on the ground that the last-named saloon keeper was guilty of contributing to such death by also selling liquor to the same person, if such person was a common drunkard, and each of the persons selling liquor to him must have known that their act was wrongful and unlawful.

J. Hall Hitchcock, E. W. Thomas, and S. P. Davidson, for the plaintiffs in error.

D. F. Osgood, and Talbot and Bryan, for the defendant in error.

605 Post, J. This was an action in the district court of Johnson county to enforce contribution on account of a judgment against the defendants in error on the bond of Torpy, a licensed saloon keeper. It appears from the petition that said Torpy obtained a license from the village board to sell liquor in the village of Sterling, and gave bond as required by law, with the other defendants in error as sureties, and that Johnson, the plaintiff in error, was also a licensed saloon keeper in said village, having given bond with the other plaintiffs in error as sureties. It is further alleged that during the year for which said licenses were issued, Sarah Rowell commenced an action in the district court of said county against the plaintiff below, Torpy, on his bond, the cause of action stated being the sale to her husband, William Rowell, of intoxicating liquors, which caused or contributed to the death of the latter; that said action resulted in a judgment against Torpy and sureties in the sum of one thousand dollars and costs, which they have fully satisfied, and that the plaintiff in error, Johnson, defendant below, sold liquor to said Rowell, which also contributed to his death. They accordingly ask judgment for seven hundred and forty dollars, being the one-half of the amount paid to satisfy the judgment aforesaid, with costs. A trial was had in the district court which resulted in a verdict and judgment for the plaintiffs below, whereupon the case was removed to this court by petition in error. On the part of the plaintiffs in error it is claimed that under the provisions of our statute the furnishing of intoxicating liquors must be regarded as a tort, and all who participate in it as wrongdoers, between whom there can be no enforced contribution, while on the part of the defendants in error it is contended that the cause of action against them for the furnishing of liquor to Rowell was a mere statutory liability for an act not illegal either at common law or by statute; hence all who

contributed ~~see~~ to his death are as between themselves jointly liable therefor. After a careful examination of the record we have reached the same conclusion as counsel for plaintiffs in error, although by a somewhat different course of reasoning, viz: From the allegations of the petition of Mrs. Rowell it is apparent that the said William Rowell was at the time the cause of action accrued against defendants in error a common or habitual drunkard within any judicial definition of the term: *Commonwealth v. Whitney*, 5 Gray, 88; *Commonwealth v. McNamee*, 112 Mass. 286; *Magahay v. Magahay*, 35 Mich. 210.

The testimony of witnesses for defendants in error, which is not contradicted, clearly proves that for several months last previous to his death, which occurred on the twenty-eighth day of August, 1888, said Rowell was in the habit of drinking to excess; that from the time the license was issued to Torpy, in the month of May previous, he, Rowell, was generally under the influence of liquor, when possessed of the means of procuring it, and that his reputation was that of a common drunkard.

The sale of intoxicating liquor to a common or habitual drunkard is unlawful in a double sense: 1. As the ground for a civil action by one who is injured thereby; and 2. A violation of the statute, which imposes upon the sellers a severe penalty therefor: See Comp. Stats., c. 50, sec. 10. In determining whether the right of contribution exists in favor of one wrongdoer against another the test is, must the party demanding contribution be presumed to have known that the act for which he has been compelled to respond was wrongful? If not, he may recover against one equally culpable, but otherwise he is without remedy: *Maxwell on Code Pleading*, 64, 172; *Jacobs v. Pollard*, 10 Cush. 287; 57 Am. Dec. 105; *Armstrong County v. Clarion County*, 66 Pa. St. 218; 5 Am. Rep. 368; *Lowell v. Boston etc. R. R. Corp.*, 23 Pick. 24; 34 Am. Dec. 33; *Acheson v. Miller*, 2 Ohio St. 203; 59 Am. Dec. 663; *Bailey v. Bussing*, 28 Conn. 455; *Adamson v. Jarvis*, 4 Bing. 66.

~~see~~ Since the proofs clearly show that Rowell was an habitual drunkard, within the meaning of the statute, at the time of the sale to him of the liquors for which his widow recovered in the action against Torpy, the latter must be presumed to have known when he sold such liquor that he was doing a wrongful and unlawful act, for which he was liable to be punished by indictment. Had he been on trial for a violation of

the statute against selling intoxicating liquors to an habitual drunkard it would not have been necessary for the state to allege or prove knowledge by him that the party named in the indictment was an habitual drunkard; that fact, under our statute, is purely a matter of defense: Bishop on Statutory Crimes, sec. 1022. As the sale of the liquor by Torpy to Rowell appears from the evidence to have been wrongful within the knowledge of the former, the judgment of the district court should be reversed and the case remanded for further proceedings therein.

Reversed and remanded.

The other judges concur.

JOINT LIABILITY—CONTRIBUTION BETWEEN WRONGDOERS.—Contribution between wrongdoers will be enforced in equity when the person seeking redress is presumed not to have known that he was doing an unlawful act: *Farwell v. Becker*, 129 Ill. 261; 16 Am. St. Rep. 267. This question is fully treated in the monographic notes to *Village of Cartersville v. Cook*, 16 Am. St. Rep. 250-257; and *Kirkwood v. Miller*, 73 Am. Dec. 147-149.

ATCHISON AND NEBRASKA RAILWAY COMPANY v. FORNEY.

[35 NEBRASKA, 607.]

JUDGMENT, PAROL EVIDENCE OF THE GROUNDS OF.—If the record does not disclose on what cause of action or of defense the judgment was based, evidence is admissible to show what issues were tried and settled by the findings and judgment, provided such evidence is consistent with the record.

A JUDGMENT FIXING THE DAMAGES TO PROPERTY IN EMINENT DOMAIN proceedings is conclusive of all damages to such property suffered by the owners thereof resulting from the proper construction of a railway or other improvement for the purpose for which compensation is sought.

A JUDGMENT IN EMINENT DOMAIN PROCEEDINGS NECESSARILY INCLUDES THE DAMAGES to an owner of property abutting upon a public street arising from the impairment or obstruction of his easements in such street by the proper construction of a railway or other contemplated improvement, and therefore, he cannot subsequently sustain an action to recover additional compensation for damages suffered from the impairment of such easement.

JUDGMENT IN EMINENT DOMAIN PROCEEDINGS.—PAROL EVIDENCE IS NOT ADMISSIBLE to prove that the jury in assessing the damages in a condemnation proceeding did not take into consideration depreciation in the value of land abutting upon a public alley by the construction of a railroad track upon such alley, when such track was already constructed when they visited the premises for the purpose of assessing the damages thereto.

Marquett and Dewess, and E. W. Thomas, for the plaintiff in error.

John Gagnon and C. Gillespie, for the defendant in error.

*** Post, J. This was an action by the defendant in error to recover for damages on account of the appropriation by plaintiff in error, defendant below, of a street and alley adjacent to his property in the town of Rulo, in Richardson county. It appears from the petition that the defendant in error is the owner of lots 15 and 16, in block 5, in Rulo proper; that said property is situated at the intersection of Stutzman and Commercial streets; that Stutzman street runs east and west and bounds said lots on the north; that Commercial street runs north and south and bounds said lots on the east, and that an alley extends through said block from north to south and is the western boundary *** of the lots aforesaid. It is further alleged that a building situated on lot 16, near the northwest corner thereof, had been used by plaintiff below, and his tenants for many years as a hotel, and that, owing to the sloping character of the ground at that point, the only convenient means of access to said hotel was through the said alley; that some time in the summer of 1886 the defendant below constructed and has since that time continuously used, a line of railroad through said alley adjacent to said lots, and over and across Stutzman street, at and adjacent to the northwest corner of said property; that the track of said railroad through said alley and over said street is twenty feet and more above the level of the ground and is supported by timbers, the benches of which are about eighteen feet apart and so constructed as to make a continuous frame of trestlework, and that the benches or supporting timbers for said track over Stutzman street are placed inside of said street so that they interfere with the right of way therein, to plaintiff's damage, etc.

The defense relied upon below was: 1. A license from the town board; and 2. A judgment and satisfaction thereof in a condemnation proceeding. The allegation with respect to the condemnation proceeding was not controverted by the plaintiff below, but at the trial the court held that the judgment in that proceeding did not include any cause of action which might have accrued in his favor for the obstruction of the street and alley, and instructed the jury to find for the plaintiff, notwithstanding the condemnation proceeding. This di-

rection we all agree was error, for which the judgment of the district court must be reversed. The evidence, to say the least, tends to prove that the damages claimed in this action were included in the award in the condemnation proceeding, and that question should have been submitted to the jury. The rule is well settled in this state that where the record does not disclose upon what particular cause of action or defense the judgment is ⁶¹⁰ based, parol or other evidence may be received for the purpose of proving what issues were tried and settled by the finding and judgment (*Wilch v. Phelps*, 16 Neb. 515; *Freeman on Judgments*, 272), although where a cause of action is directly within the issues presented by the pleadings in a former suit or proceeding, the presumption is that it was considered and settled by the judgment therein rendered: *McDaniel v. Fox*, 77 Ill. 343. There is, however, a more serious objection to the judgment in this case, viz., it is apparent from the record that the question at issue herein was in fact considered and determined in the condemnation proceeding, and that it is now *res judicata*. The petition or application addressed to the county judge for the appointment of commissioners to assess damages, etc., is in due form, and, among other tracts, names the west twenty-five feet of lots 15 and 16 in block 5, in Rulo proper. Subsequently the commissioners filed their report or award as follows:

"We, the undersigned disinterested freeholders and commissioners, residents of Richardson county, Nebraska, appointed by the county judge of said county to appraise the damages accruing to the following named owners and lienholders by reason of the appropriation of the hereinafter described lots, parts of lots, and parcels of land taken for right of way, sidetracks, and railroad purposes by the Atchison and Nebraska Railroad Company, situated in Rulo proper, . . . in Richardson county, Nebraska, as shown on the map of said railroad as submitted to us by the agent of said railroad company, and belonging to the hereinafter named owners and lienholders, having been duly qualified, and each having personally examined the premises on the day pursuant to adjournment from June 26, 1886, and at the time mentioned in the notice filed with the county judge at the office of said county judge in said county, find the value and damages according therefor as follows:

"Lots 15 and 16, block 5, Rulo proper—A. P. Forney ⁶¹¹ and Geo. Bowker, owners of west twenty-five feet of lots 15 and

16, block 5, one thousand six hundred and fifty dollars. And all other damages accruing by reason of the taking of said lots and parcels of land we hereby appraise, and accordingly award, said values and damages at the total sums set opposite said owners' and lienholders' names."

From this award the railroad company took an appeal to the district court, where a trial was had, resulting in a judgment for the defendant in error, Forney, which has been paid and satisfied in full.

It further appears to be undisputed that, at the time of the trial of the case on appeal, the track had been fully completed and was in operation along the alley and across the street in question, and that the jury, under the direction of the court, were taken to view the premises. The whole question of the damage to the property was certainly submitted to the jury upon the very best of evidence, viz., the senses of the jurors themselves. When they inspected the property in order to assess the damage of defendant in error they must have observed, not only the situation of the track with reference to the buildings, but also the elevation thereof along the alley and in the street. They saw the foundations or benches upon which the trestlework rests, extending from the alley onto the lots, and the track extending along the alley and across the street at an elevation of twenty feet and upward, and they could not have excluded the obstruction of the street from their estimate of damage. That was certainly one of the elements of damage, since its direct tendency was to diminish the value of the property. This is but stating in different language the rule that a single cause of action, whether arising *ex contractu* or *ex delicto*, is indivisible: Freeman on Judgments, 238, 241; *Gapen v. Bretternitz*, 31 Neb. 302.

Decisions of this court are uniform to the effect that an action for damage will lie in behalf of the owner of property abutting upon a public street, where his easement is ⁶¹² interfered with in the construction of a railroad track, although no part thereof is appropriated. This rule is so well settled as to render the citing of the cases entirely superfluous. It has also been held that the statutory remedy by condemnation proceeding, when once instituted, is exclusive as to all damage for the proper construction of the road: *Fremont etc. R. R. Co. v. Whalen*, 11 Neb. 585; *Republican Val. R. R. Co. v. Fink*, 18 Neb. 82; *Chicago etc. R. R. Co. v. Wiebe*, 25 Neb. 542.

As said by the present chief justice in *Republican Val. R. R. Co. v. Fink*, 18 Neb. 82, "The statutory mode of acquiring the right of way and ascertaining the damages therefor is exclusive as to the manner of assessing the value of the land taken, with damage to the residue of the tract." In the recent case of the *Atchison etc. R. R. Co. v. Boerner*, 84 Neb. 240, 88 Am. St. Rep. 637, the question now involved was carefully considered by Judge Norval. In that case the point at which the street was obstructed by the railroad track was more than one thousand feet distant from the property involved in the prior condemnation proceeding. Although it was held that there was no presumption that the question of damage was adjudicated in the condemnation proceeding, it is said in the second point of the *syllabus*, "The judgment of the district court on appeal from an award of damages in condemnation proceedings is conclusive upon the parties as to all questions actually litigated therein, and as to all matters necessarily within the issue joined, although not formally litigated." One cause of action in that case was the obstruction of an alley adjacent to the property by an elevated track, as in this case, but it was held that the conclusive presumption is, that compensation for that injury had been allowed in the condemnation proceeding. It is said in the opinion: "Boerner was entitled to have all proper elements of damage considered by the commissioners, and if they failed so to do, he cannot afterwards maintain an action to recover the damage then omitted, which was necessarily involved in the issues in the condemnation ^{and} proceeding, and which he was bound to present for their consideration therein." And in *Sioux City etc. R. R. Co. v. Weimer*, 16 Neb. 272, it was held in a condemnation proceeding, that the proprietor was entitled to recover on account of a deep cut in a highway adjacent to his property.

The question how remote the obstruction in a street must be from the property involved in a condemnation proceeding to entitle the owner to maintain a subsequent action therefor may involve difficulty in its solution; nor have we any occasion to assert a general rule on the subject. The obstruction for which defendant in error claims is so near to his property as to amount to a direct injury to the property itself, so that both the commissioners and the jury in the district court must have taken it into consideration in their estimate of damage. The rule for assessing damage in such cases is

well settled in this state, viz.: 1. The value of the land actually taken (in this case twenty-five feet next the alley); 2. The depreciation in value, if any, of the remaining part of the tract caused by the construction of the railroad: *Fremont etc. R. R. Co. v. Marley*, 25 Neb. 138; 13 Am. St. Rep. 482; *Blakeley v. Chicago etc. Ry. Co.*, 25 Neb. 207. The jury, therefore, in assessing the damage in the condemnation proceeding, must have determined the extent of the depreciation in value of the lots in question by the construction of the track, and we are no more at liberty to presume that the obstruction in the street was excluded from their consideration than that they overlooked a building situated on the property itself. The judgment of the district court should be reversed, and the case remanded for further proceedings therein.

Reversed and remanded.

The other judges concur.

EVIDENCE, PAROL—JUDGMENTS.—Parol evidence to show the grounds of a former judgment offered in evidence in another action between the same parties is admissible, where from the form of the issue in the first action, such grounds do not appear from the record, provided that such grounds might have been given in evidence under that issue: *Wood v. Jackson*, 8 Wend. 9; 22 Am. Dec. 603. Parol evidence is admissible where a judgment is general, to show what has been tried and determined thereby: *Estill v. Taul*, 2 Yerg. 466; 24 Am. Dec. 498; *Warwick v. Underwood*, 3 Head, 238; 75 Am. Dec. 767, and note. See further on this subject the notes to the following cases: *Young v. Rummell*, 38 Am. Dec. 597; *King v. Chase*, 41 Am. Dec. 683; and *Doty v. Brown*, 53 Am. Dec. 356.

EMINENT DOMAIN—CONCLUSIVENESS OF JUDGMENT AS TO DAMAGES.—A judgment of a court having jurisdiction to award damages in a proceeding to condemn lands for railroad purposes is conclusive upon the parties thereto as to all questions actually litigated, as well as all matters necessarily within the issue joined, though not formally litigated: *Atchison etc. R. R. Co., v. Boerner*, 34 Neb. 240; 33 Am. St. Rep. 637.

WILLARD v. NELSON,

[35 NEBRASKA, 651.]

NEGOTIABLE INSTRUMENTS—FRAUD IN PROCURING.—A negotiable note procured to be executed by a person unable to read or write, by representing to him that it was an entirely different contract, is void even in the hands of a *bona fide* holder if, in the judgment of the jury, the maker of the note was not under the circumstances guilty of negligence.

M. V. Moudy, and Sullivan and Reeder, for the plaintiff in error.

M. Whitmoyer, for the defendant in error.

¶ NORVAL, J. This is an action to recover of the defendant in error the amount of a promissory note for the sum of one hundred and twenty dollars, which it is alleged he executed at Columbus, this state, on the twenty-sixth day of October, 1887, payable to the order of Cole, Grant & Co. one year after date, with interest at ten per cent, and indorsed by the payees to the plaintiff before maturity.

The answer sets up the illiteracy of the defendant, want of consideration, and that the note was procured by fraud and circumvention practiced upon him by the agent of Cole, Grant & Co. The reply denies the allegations of the answer. The jury found for the defendant, and the plaintiff brings error.

On the trial the plaintiff introduced testimony tending to show that the defendant's genuine signature is attached to the note, and that plaintiff purchased it for value before maturity. He also introduced the instrument in evidence, and then rested his case. Thereupon the defendant introduced testimony to the effect that in October, 1881, he met in Columbus a person who represented himself to be the agent of Cole, Grant & Co. in the sale of a certain combination flat and wire fence; and that defendant was induced to and did consent to act as agent for said Cole, Grant & Co. in the sale of such fence in certain townships of Platte county. A commission contract, partly written and partly printed, constituting and appointing the defendant as such agent, was prepared by the agent of Cole, Grant & Co., which was signed by both parties. The defendant further testified that he signed his name but twice on that occasion, and he supposed he was signing duplicate contracts; that he is illiterate, and unable to read English; that the stranger ¶ read over the contract to him before it was signed; that nothing was said at any time about the defendant giving a note, nor did he know that he had signed one until long after the agent of the payees had left the county. This testimony is undisputed. The uncontradicted proof shows that while the defendant's genuine name is appended to the note, he never executed and delivered the same knowing it to be such, but that by some artifice or trick he was duped and defrauded into signing it, supposing it to be an agency contract for the sale of the fence. The note was absolutely without consideration. Only the two parties to the transaction being present when the paper was signed, the defendant was compelled to trust to the reading thereof to the agent of the payees. Whether the defendant

was guilty of negligence or not was for the jury to determine from all the facts and circumstances in evidence. If he was free from negligence or fault, and was tricked into signing the note, as the jury must have found, and the evidence tends to show, then the plaintiff cannot recover, although he may be a *bona fide* holder: *First Nat. Bank v. Lierman*, 5 Neb. 247; *Dinsmore v. Stimbert*, 12 Neb. 433; *First Nat. Bank v. Deal*, 55 Mich. 592; *Bowers v. Thomas*, 62 Wis. 480; *Soper v. Peck*, 51 Mich. 563.

The plaintiff on rebuttal called as a witness one Gus Willson, and propounded to him the following question:

Q. State if Mr. Willard applied to you, about the time this note was purchased by him, to ascertain if he knew anything about the genuineness of this signature before he purchased.

Objected to as immaterial and not responsive to the issues, and not rebuttal. Sustained. Exception.

The plaintiff offered to prove by the witness that within four or five days after October 26, 1887, the plaintiff in the action, D. A. Willard, came to the witness at his bank in Genoa, Nebraska, and asked him concerning the note ⁶⁵⁴ in suit and the responsibility of the defendant, and exhibited to the witness the instrument, asking him whether it was all right; that the witness then stated to plaintiff that the signature to the note was genuine, and that the defendant was financially solvent. Defendant objected to the offer, which was sustained.

The offered testimony was excluded, and we think, rightly so, as it was clearly immaterial. The answer admitted the signature to the note, and the jury were so instructed. Besides, it was not competent to prove what the witness said to plaintiff about the note before it was purchased, as such testimony had no bearing upon the issues in the case, and was hearsay.

Several exceptions were taken to the charge of the court as given, and the refusal to give instruction one, requested by the plaintiff. None of these are well taken. Counsel have not pointed out a single objection to the charge of the court, and we are unable to discover any error therein. The instructions are in harmony with the authorities cited above, and the case went to the jury under a charge quite as favorable to the plaintiff as the case would warrant. The verdict has ample support in the evidence, and finding no

error in the record, the judgment of the district court is affirmed.

The other judges concur. —

NEGOTIABLE INSTRUMENTS, FRAUD IN PROCURING DELIVERY OF.—The question when, if at all, fraud is available as a defense to a negotiable instrument, as against a *bona fide* holder thereof, is perhaps sufficiently considered in the note to *Bedell v. Herring*, 11 Am. St. Rep. 309-328. There is no doubt of the existence of the general rule there stated "that the holder of a negotiable instrument, who acquires it *bona fide*, without notice, in the usual course of business, for a valuable consideration, and before maturity, takes the paper unaffected by fraud in its origin." This rule is well nigh indispensable to the transaction of commercial affairs, and every limitation upon it should be viewed with suspicion. Nevertheless, in a few of the states, an exception has been expressly introduced by statutes subjecting *bona fide* holders of such paper to the defense of fraud in its inception. The interpretation of these statutes will not be here considered, both because of their local character, and for the further reason that they have not been sufficiently long in force to have their legal signification settled in the local tribunals. The following are the decisions made under these statutes coming within our observation: *Cover v. Myers*, 75 Md. 406; 32 Am. St. Rep. 398; *Griffith v. Shipley*, 74 Md. 591; *Hewitt v. Jones*, 72 Ill. 218; *Hubbard v. Rankin*, 71 Ill. 129; *Hewitt v. Johnson*, 72 Ill. 513; see note to *Bedell v. Herring*, 11 Am. St. Rep. 313.

The rule asserted in the principal case is defensible, if at all, on the ground that the note in question was neither executed nor delivered by the person by whom it was signed. This is the only ground on which in any case the enforcement of a negotiable note can be resisted in the hands of a *bona fide* holder thereof. If the paper were not negotiable, no doubt this ground ought to be regarded as sufficient, but the question is whether the character of negotiable instruments and the considerations of public policy attending them do not absolutely require that *bona fide* holders thereof should be protected from every defense except that the signature of the maker is not genuine. Probably no great hardship would result from adding to this exception those cases in which a signature has been written or found upon a blank piece of paper, under such circumstances that the writer had no reason to suspect that it would be connected with any written obligation, and which some wrongdoer has converted into an apparent obligation by writing over it a negotiable instrument. Therefore, some of the decisions maintain that against a *bona fide* holder the defense of want of delivery will not be entertained: *Kinyon v. Wohlford*, 17 Minn. 239; 10 Am. Rep. 165; *Clark v. Johnson*, 54 Ill. 296; *Shipley v. Carroll*, 45 Ill. 285; *Gould v. Seger*, 5 Duer. 260. There is probably no dissent from the proposition that this rule should be applied to bank notes and other paper intended to circulate as money: *Worcester County Bank v. Dorchester etc. Bank*, 10 Cush. 488; 57 Am. Dec. 120. In America, however, the entire absence of a delivery, in a majority of the cases, has been regarded as a sufficient defense even against a *bona fide* holder, unless the maker has executed an instrument perfect in form, and has been guilty of negligence in letting it go out of his possession, and thereby giving an opportunity to negotiate it to an innocent purchaser: *Carter v. McClintock*, 29 Mo. 464; *Chipman v. Tucker*, 38 Wis. 43; 20 Am. Rep. 1; *Hall v. Wilson*, 16 Barb. 548, 555; *Burson v. Huntington*, 21 Mich. 415; 4 Am. Rep. 497. In

England there are no decisions necessarily determining the question, and of the *dicta* some affirm (*Marston v. Allen*, 8 Mees. & W. 504; *Baxendale v. Bennett*, L. R. 3 Q. B. Div. 525) and others deny (*Ingham v. Primrose*, 7 Com. B., N. S., 82; 5 Jur., N. S., 710; *Young v. Grote*, 4 Bing. 253) that a delivery is indispensable. In America, those cases involving the delivery of a note left in escrow, contrary to the terms upon which it was to have been delivered, have affirmed the liability of the maker: *Fearing v. Clark*, 16 Gray, 74; 77 Am. Dec. 394; *Graff v. Logue*, 61 Iowa, 704.

If there is no delivery of any perfect instrument, as where a signature is obtained written upon a blank piece of paper for some purpose apparently innocent, and disconnected from the execution of any obligation or other paper, the authorities agree that the subsequent writing of a negotiable instrument over such signature by a person who is a mere forger, and has no authority to use the signature for the purpose of writing any obligation above it, does not impose any liability on the apparent maker of such instrument: *Chas v. Guthrie*, 42 Ind. 227; 13 Am. Rep. 357; *Caulkins v. Whisler*, 29 Iowa, 495; 4 Am. Rep. 236; *Nance v. Lary*, 5 Ala. 370. But one who signs his name to an instrument having blanks therein, or upon a blank paper, authorizing another to write a commercial obligation above it, or gives a perfectly executed instrument to an agent, to be delivered upon certain conditions, cannot defend against a *bona fide* holder on the ground that the agent wrote an obligation different from that authorized: *Geddes v. Blackmore*, 132 Ind. 551; *Davis v. Lee*, 26 Miss. 505; 59 Am. Dec. 267; *Breckenridge v. Lewis*, 84 Me. 249; 30 Am. St. Rep. 353; or delivered the instrument without exacting compliance with the prescribed conditions: Note to *Bedell v. Herring*, 11 Am. St. Rep. 314.

We come now to the consideration of those cases in which a party signs a writing, knowing it is to be used for some purpose and intending to deliver it for that purpose, when the writing is in fact of a different character from what he supposed it to be, and it is intended by the party procuring it to be used, and is used, for a different purpose, as where it is a negotiable instrument, but was represented and believed to be a receipt, power of attorney, or other paper. If the signer can read writing and failed to read what he signed, or, if, though unable to read writing, he has an opportunity to have it read by another and neglects to have such reading, he is guilty of negligence, and the cases are nearly, or quite, unanimous in asserting that if a signer of a negotiable instrument has been guilty of negligence in signing it and furnishing an opportunity to negotiate it, he cannot escape liability to a *bona fide* holder: *Cowgill v. Petifah*, 51 Mo. App. 264; *Dinsmore v. Stimbart*, 12 Neb. 433; *Baldwin v. Barrows*, 86 Ind. 351; *Cannon v. Lindsey*, 85 Ala. 198; 7 Am. St. Rep. 38; *Fisher v. Von Behren*, 70 Ind. 19; 36 Am. Rep. 162; *Pennsylvania R. R. v. Shay*, 82 Pa. St. 198; *Ruddell v. Phalor*, 72 Ind. 533; 37 Am. Rep. 177; *Roach v. Karr*, 18 Kan. 529; 26 Am. Rep. 788; *Abbott v. Rose*, 62 Me. 194; 16 Am. Rep. 427; *Chapman v. Rose*, 56 N. Y. 137; 15 Am. Rep. 401.

In several of the states the liability of the maker of a negotiable instrument obtained from him by the fraudulent trick or device of a third person, and which such maker did not know to be a negotiable instrument and did not intend to deliver as such, is made to depend upon the question whether he was negligent or not, and, when in the opinion of the jury, or of the court performing in this respect the functions of a jury, he was free from neglect, no recovery against him can be sustained, even in favor of a *bona fide* holder: *Walker v. Ebert*, 29 Wis. 194; 9 Am. Rep. 548; *Kellogg v. Steiner*,

29 Wis. 626; *Oline v. Guthrie*, 42 Ind. 227; 13 Am. Rep. 357; *Webb v. Corbin*, 78 Ind. 403; *Bowers v. Thomas*, 62 Wis. 480; *Soper v. Peck*, 51 Mich. 563; *First Nat. Bank v. Lierman*, 5 Neb. 247; *Griffiths v. Kellogg*, 39 Wis. 290; 29 Am. Rep. 48; *Briggs v. Beart*, 51 Mo. 245; 11 Am. Rep. 445, and the principal case.

In perhaps a majority of the states in which the question has arisen the inclination of the courts is not to introduce into the law of negotiable instruments the dangerous and embarrassing question of the negligence of the maker in executing them and to permit him to fix upon an innocent purchaser a loss resulting from his own want of care. While there are many people who cannot read and who are therefore subject to imposition by misreading writings to them, rarely or never is one called upon to sign a writing when it is not easily possible for him to have it read to him by a person having no interest in the transaction and therefore not liable to participate in any fraud upon him, and to sign and part with the possession of a writing without having it read to him, in our judgment, such negligence that if anyone is to suffer for it he should be the signer rather than the bona fide holder of a negotiable instrument. Therefore, we think the better rule is, that he who signs a writing, knowing that it is intended to be used, or may be used, for some business purpose, must at his peril ascertain that it is not a negotiable instrument, and failing to do this, is liable absolutely, though he was procured to sign it by some fraudulent device or misrepresentation, or having signed it advisedly, it was taken from his possession by fraud or theft and without any intention on his part to deliver it to anyone, or to let it be negotiated for his benefit or otherwise: *Kinyon v. Wohlford*, 17 Minn. 239; 10 Am. Rep. 166; *Shipley v. Carroll*, 45 Ill. 286; *Clarke v. Johnson*, 54 Ill. 296; *Breckenridge v. Lewis*, 84 Me. 349; 30 Am. St. Rep. 353; *Rowland v. Fowler*, 47 Conn. 347; *First Nat. Bank v. Johns*, 22 W. Va. 520; 46 Am. Rep. 506; *Merritt v. Bagwell*, 79 Ga. 578. As was said by Judge McFarland with great clearness and force in *Beddell v. Herring*, 77 Cal. 572, 11 Am. St. Rep. 307, "It is apparent that to apply to such an instrument the principles which establish the essentials of an ordinary contract as between the original parties—as, for instance, that there must be consent of the parties and a sufficient consideration; that where there was no intention to sign there was, in law, no signature; that fraud vitiates a contract *ab initio*, etc.—would be to undermine the whole structure of commercial law, and 'shake paper credit to its foundation.'"

GANDY v. JOLLY.

[35 NEBRASKA, 711.]

A JUDGMENT BASED UPON A SERVICE OF SUMMONS BY READING IT TO THE DEFENDANT when the law requires a copy to be given him, though reversible upon appeal, is not void.

PRACTICE.—In an action brought by attachment against the defendant in the county where he had resided, in which it is charged he has absconded, process may be served on him in any county in which he may be afterwards discovered, and a judgment secured upon such process cannot be disregarded as void.

ACTION to recover of the defendant by virtue of a garnish-

ment of an indebtedness due from her to C. U. Richardson against whom a judgment had been entered after the service of garnishment process upon her. She insisted that the judgment was invalid because the attachment proceedings were in Richardson county and the judgment debtor was served with process in Custer county, the statute requiring the action to be brought in the county in which the defendant resides or can be served. The court in the opinion referred to in 34 Nebraska, 536, decided that, as it was not seriously contended that Richardson had not absconded for the purpose of defrauding his creditors, it could not be known at the time the action was brought whether he had left the state or not, and therefore that the commencement of the action in Richardson county and the service of process in Custer county were justifiable and the judgment valid. Judgment was therefore entered against the defendant.

Daniel F. Osgood and E. W. Thomas, for the defendant.

⁷¹³ MAXWELL, C. J. An opinion was filed in this case which is reported in 34 Nebraska, 536. A motion for a rehearing has been filed in this case and as the questions involved are of considerable importance we have deemed it proper to present the reasons for our ruling in the form of an opinion.

Briefly stated, the defendants in error are partners, and in April, 1888, brought an action by attachment in the county court of Richardson county against one Charles U. Richardson, and the plaintiff in error was served with notice as garnishee. She answered that she had about two thousand bushels of wheat of Richardson's subject to her chattel mortgage lien thereon for a loan of money. Afterwards judgment was taken by default against Richardson in favor of the defendants in error for the sum of one hundred and forty-five dollars, and costs taxed at thirty-three dollars and fifty cents, and the plaintiff in error was ordered to pay into court the surplus of wheat held upon her chattel mortgage. This not being done the defendants in error brought an action against the plaintiff in error for the value of said property. In her answer she denied that the ⁷¹³ defendants in error had recovered judgment against Richardson. On the trial the defendant in error recovered judgment in the district court against the plaintiff in error, and she now brings the cause into this court; the defense being that there is no valid judgment against Richardson.

The grounds upon which the plaintiff in error bases her claim are that the action was brought in the wrong county, and that service is shown to have been made upon Richardson by reading the summons to him. Do these defects render the judgment void?

In *Newlove v. Woodward*, 9 Neb. 502, in a direct attack upon the judgment based on such service, this court held it insufficient. That case has been followed in one or two other cases, and no doubt is correct, where objection is made in a proceeding to correct the judgment. But suppose a judgment has been rendered, as in this case, upon such service, is the judgment void? We must bear in mind that the *nisi prius* court has held it sufficient, and the question is, did that court err?

In Black on Judgments, section 224, it is said: "Although the service of process in an action may have been characterized by some defect or irregularity, it does not necessarily follow that the ensuing judgment will be void. For if the party would take advantage of such a matter he must do so in the action itself by some proper motion or proceeding. It is only when the attempted service is so irregular as to amount to no service at all that there can be said to be a want of jurisdiction. In any other case there may be error in the subsequent proceedings, but they will be sustained against a collateral attack. But a judgment recovered by default upon service of the summons by delivery of a copy to a third person who is not a resident at the 'house of defendant's usual abode' is void for want of jurisdiction. And so a citation addressed to and served upon a stranger, although he is the authorized agent of the defendant, is not binding upon the latter, and ⁷¹⁴ will not authorize a judgment against him. So a judgment by default is void when the service had upon the defendant consisted only of the handing to him, by plaintiff's attorney, of a copy of the declaration on the day before the original declaration was filed. And the same consequences were held to result in a case where the return to the summons was made in the name of a deputy sheriff, instead of the name of the sheriff himself. And it is said that where the sheriff who serves the writ is himself the plaintiff the judgment in the suit so begun is a nullity, and the defendant may restrain it by injunction."

In Freeman on Judgments, section 126, the matter is stated very clearly. It is said: "From the moment of the service

of process, the court has such control over the litigants that all its subsequent proceedings, however erroneous, are not void. If there is any irregularity in the process or in the manner of its service the defendant must take advantage of such irregularity by some motion or proceeding in the court where the action is pending. The fact that defendant is not given all the time allowed him by law to plead, or that he was served by some person incompetent to make a valid service, or any other fact connected with the service of process, on account of which a judgment by default would be reversed upon appeal, will not ordinarily make the judgment vulnerable to a collateral attack. In case of an attempted service of process, the presumption exists that the court considered and determined the question whether the acts done were sufficient or insufficient. If so, the conclusion reached by the court, being derived from hearing, and deliberating upon a matter which, by law, it was authorized to hear and decide, though erroneous, cannot be void."

As applied to this case, if we take the statement of the plaintiff in error, there was an attempt to serve a valid summons on Richardson. He was notified that an action had been instituted against him, and that it was his duty to ⁷¹⁵ answer at a definite time. It is true that the service as shown by the return was not by copy as the statute requires, but it was not void. Had Richardson appeared and objected to the service, it would have been set aside as defective and irregular, and the court would have required new service before proceeding to render judgment. No objections were made, however, and the court, in rendering judgment against Richardson, held it sufficient; and, as it was not void, but voidable, it was not subject to collateral attack, and therefore the objections of the plaintiff in error are overruled.

The action was instituted in Richardson county, where the defendant appears to have resided. It is charged in the affidavit for an attachment that he had absconded with the intent to defraud his creditors. If this were true it would be sufficient to sustain the attachment, although it afterwards appeared that he had not left the state. Ordinarily it could not, in such case, be known whether he had left the state or not, or that he had clandestinely removed to another county, if such was the case, and it is sufficient to bring the action in the county where he formerly resided, and even if his residence is afterwards discovered in the state, and service made

upon him there, it will be sufficient, unless he appears and contests the right of the creditor to maintain the action. There is no cause for a rehearing, and the motion is overruled.

Motion overruled.

The other judges concur. —

PROCESS—SERVICE OF.—The statutory requirements for service of process must be strictly complied with, otherwise the court does not obtain jurisdiction: *Greenwood v. Murphy*, 131 Ill. 604. The mode in which writs shall be served is regulated by statute, and, unless substantially conformable thereto, the doings of the officer are void: *Benson v. Smith*, 42 Ma. 414; 66 Am. Dec. 285.

DEMING v. MILES.

[35 NEBRASKA, 780.]

DEEDS, RECORDING OF, WHEN COMPLETE.—Under a statute providing that every deed entitled to be recorded shall be recorded as of the time when it was delivered to the clerk for that purpose, and shall be considered recorded from the time of such delivery, it is conclusive notice to all subsequent purchasers and mortgagees, whether actually recorded or not.

DEED.—THE DESTRUCTION OF THE RECORD OF A DEED does not impair the effect of such record as notice to subsequent purchasers and encumbrancers.

TENANT BY THE CURTESY MAY CONVEY HIS TITLE by deed or mortgage, and a mortgage by him, though purporting to be of the fee, is enforceable against his interest in the property.

TENANCY BY THE CURTESY EXISTS IN FAVOR OF A HUSBAND IN LANDS WHICH HE HAS CONVEYED TO HIS WIFE by deed of general warranty, if such deed does not specify that the property shall be held for the sole and separate use and benefit of the wife, and that her husband shall have no interest or title in or control over the same.

J. L. White and A. S. Sands, for the appellants.

R. M. Snively, for the respondent.

740 NORVAL, J. This action was brought in the court below by appellee against William H. Miles and Nellie E. Miles, to foreclose a mortgage executed by them upon the west half of the southeast quarter and the east half of the southwest quarter of section 1, town 7 north, of range 28 west of the sixth principal meridian. The district court permitted Laura Miles, the minor child of the said William H. Miles by a former wife, to intervene in the action. A guardian *ad litem* was appointed for the minor, who filed an answer setting up

therein that at the time of the execution of the mortgage the said Laura Miles was the sole owner in fee simple of the land in controversy, having acquired title thereto by inheritance from her mother; that said mortgage conveyed no interest in the lands therein described, and is a cloud upon her title to said premises. The answer closes with prayer that the mortgage be canceled and that the title to the real estate be quieted in said minor. A reply was filed by the plaintiff. Upon the trial the court found that at the time of the execution of the mortgage, said William H. Miles was the owner in fee simple of said real estate; that the mortgage was valid and binding, and a decree of foreclosure and sale was entered for six hundred and twenty-eight dollars and nine cents. For and on behalf of the said minor this appeal is prosecuted.

The record before us shows that on the eleventh day of January, 1879, the defendant, William H. Miles, was the owner in fee simple of the real estate covered by the mortgage, and on said day, by deed of general warranty, he ⁷⁴¹ conveyed the same to one Laura C. Murphy, which deed appellant contends was duly recorded on the fourth day of March, 1879; that on the thirteenth day of said month the said William H. Miles was married to said Laura C. Murphy; that on the twenty-second day of January, 1880, the appellant, Laura Miles, was born as the lawful issue of said marriage, and that on the twenty-seventh day of the same month said Laura C. died intestate, leaving surviving her, as her sole and only heir, the said minor. Subsequently, the said William H. Miles was married to one Nellie E. Murphy, and they, on the sixteenth day of August, 1883, executed, acknowledged, and delivered the mortgage in suit to secure a loan of five hundred dollars, which mortgage was recorded on the eighteenth day of September, 1883, in the mortgage records of Frontier county.

Appellant contends that the said deed of January 11, 1879, from Miles to Murphy, was duly filed and recorded on the fourth day of March, 1879, in the office of the county clerk of the county where the lands therein described are situated. It is undisputed that in the early part of the year 1883, the courthouse and records of Frontier county were entirely destroyed by fire. Subsequently, but prior to the making and recording of the mortgage for the foreclosure of which this action was instituted, the records with reference to the lands covered by said mortgage were so restored as to show that the

title to the lands stood in the name of William H. Miles. The said deed from Miles to Laura C. Murphy at that time did not appear of record, and appellee insists it was not established that it was not ever on record prior to the making of the mortgage. Upon the trial the original deed was produced and put in evidence with the indorsements thereon. Upon the back of the instrument is to be found the following certificate:

"Filed for record this fourth day of March, A. D. 1879, eleven o'clock A. M., and entered in numerical index of deeds. Recorded this fourth day of March, 1879.

"A. L. MORGAN,

"County Clerk."

743 It was also proven by Mr. Morgan, who was the county clerk of Frontier county in 1879, that the above certificate is in his handwriting and was made while he was such clerk. Mr. Morgan further testified, in answer to the question, "You may state whether you received that deed for record at the time stated, and whether you spread it at large upon the records of the county?" that "It was undoubtedly received then according to the indorsement as filed, but I see there is no page mentioned or the number of the deed record, and I cannot say positively whether it was recorded or not. I was just commencing with the business and not very well acquainted with it at the time. It was not customary to place 'recorded this day,' etc., until after the record was done, and then place the name of the record and page; but I see the page is not mentioned here. Whether it was recorded I do not know; I cannot say positively whether it was or not."

Although Mr. Morgan's testimony does not show that the deed was in fact spread upon the deed records of the county, the fact of its being delivered to the county clerk for such purpose clearly appears from the testimony of the witness as well as by the indorsement upon the back of the instrument.

By section 15 of chapter 73 of the Compiled Statutes, entitled "Real Estate," it is provided that "every deed entitled by law to be recorded shall be recorded in the order and as of the time when the same shall be delivered to the clerk for that purpose, and shall be considered recorded from the time of such delivery." Whether the deed in question was in fact recorded is quite immaterial so far as the rights of appellant are concerned. Where a party files a deed or mortgage, properly executed and acknowledged, for record with the proper officer he has complied with the law, and he

is not bound to see that the officer performs his duty by actually recording it, nor will the law hold him responsible to the parties for the omission or neglect ⁷⁴³ of the officer to discharge his duty. The proper filing of the deed for record operated as constructive notice to all subsequent purchasers and mortgagees: *Perkins v. Strong*, 22 Neb. 725.

We are, however, satisfied from other testimony contained in the bill of exceptions that the deed was actually recorded. It appears from the testimony of W. L. McClay, who was the county clerk of Frontier county during the year 1882, that between the fifteenth and twenty-fifth days of December of that year, at the request of Burton and Harvey, of Orleans, he examined the records of his office for the purpose of ascertaining what property, real as well as personal, was owned by said W. H. Miles; that upon such examination he found that the title to the land in litigation stood of record in the name of Laura C. Murphy, which was the maiden name of Mr. Miles' first wife. No testimony was introduced by appellee to controvert the fact of the recording of the deed, but he insists that the evidence introduced by appellant is insufficient to establish that the instrument was ever recorded. His contention must be overruled. The fact that the record of this deed was destroyed does not affect the rights of appellant. There can be no doubt that where a deed, properly executed and acknowledged, is duly filed and recorded, it is thenceforth notice to all the world, although the record may be totally destroyed by fire. Such is the uniform adjudication in this country: *Wade on Notice*, sec. 157; *Alvis v. Morrison*, 63 Ill. 181; 14 Am. Rep. 117; *Shannon v. Hall*, 72 Ill. 854; 22 Am. Rep. 146; *Gammon v. Hodges*, 73 Ill. 140; *Myers v. Buchanan*, 46 Miss. 397.

To our mind it is perfectly plain that the mother of appellant at the time of her death was the owner in fee simple of the real estate involved in this litigation. Under the law in force at the time of the death of the mother the husband, William H. Miles, took only a life estate in the lands, and, subject to his right of curtesy, they descended to appellant as the sole and only heir at law of Laura C. ⁷⁴⁴ Miles, deceased. The mortgage did not convey the fee-simple title, and the district court erred in so finding and in entering the decree it did, for the reason that William H. Miles only owned an estate by the curtesy. The life estate of a husband as tenant by the curtesy in the real property of his wife of which

she died seised is subject to seizure and sale on execution against him. Likewise a tenant by curtesy may convey his title by deed or mortgage: *Forbes v. Sweesy*, 8 Neb. 525; *Lessee of Canby v. Porter*, 12 Ohio, 79; *Shortall v. Hinckley*, 81 Ill. 219; *Ross v. Sanderson*, 38 Ill. 247; *Lang v. Hitchcock*, 99 Ill. 550; *Bozarth v. Largent*, 128 Ill. 95; *Edmunds v. Leavell* (Ky., Feb. 10, 1887), 8 S. W. Rep. 134. It is clear from the foregoing authorities that the mortgage covered the interest of the mortgagor in the premises. Appellee is entitled to a foreclosure and sale only of the life estate of the defendant William H. Miles.

It is claimed that the mortgage is invalid, for the reason that at the time of the death of Laura C. Miles the premises were occupied by her and her husband as a family homestead, and the husband therefore could not encumber the same. As no such issue is tendered by the pleadings in the case we will not take the time to consider the point raised in the brief of counsel.

Lastly, it is urged that William H. Miles has no estate by the curtesy in the premises for the reason appellant's mother acquired title thereto directly from him by a deed of general warranty, and the cases of *McCulloch v. Valentine*, 24 Neb. 215, and *Pool v. Blakis*, 53 Ill. 495, are cited in the brief of counsel in support of the proposition. An examination of these authorities will show that they are not in point. In the case in our own reports one Ebenezer McCulloch, by his last will and testament, provided that a certain farm owned by the testator should be sold by his executors, and the money arising therefrom be equally divided among his daughters, stipulating that the share going to his daughter, Elizabeth Pemberton, should be ⁷⁴⁵ retained by his sons, Ebenezer Z. and George C., who were by the will appointed trustees for that purpose, and who were "to retain the same in trust for the benefit of said Elizabeth Pemberton and her children, her husband to have no control over the same, but that the said trustees might, with the consent of said Elizabeth Pemberton, invest the same as they should deem best, so that the daughter and her children shall have the benefit of the same without the control of her husband."

The farm was sold in accordance with the provisions of the will, and with the share of the funds intended for Elizabeth Pemberton the trustees purchased a quarter section of land in Hamilton county in this state, and a deed therefor was

taken in their own names as trustees, the *habendum* clause of the deed reading, "To have and to hold the said real estate, with the appurtenances, to the said second parties as trustees of said Elizabeth Pemberton, they being appointed as trustees by the will of their father, . . . for her sole and separate use and benefit so long as she may live, and after her death for the use and benefit of her children, the said trustees having the power to sell and convey said land, or any part thereof, on the written request of said Elizabeth Pemberton, and her joining with them in any such conveyance." Subsequently Elizabeth Pemberton died intestate, leaving her husband and their three children surviving her. Afterwards it was sought to sell the lands under an execution against the husband. This court held that he took no estate in the lands as tenant by the curtesy. The Illinois case is quite similar to the one reported in 24 Nebraska. In each case the instrument construed specified in effect that the property therein described was for the sole and separate use and benefit of the wife, and that the husband should have no interest and title in, or control over, the same. But the deed under consideration in the case at bar contains no limitations whatever. The fact that William H. Miles was the grantor in the deed does not bar his right to an estate ⁷⁴⁶ by curtesy, since such right was not limited by the conveyance: *Robie v. Chapman*, 59 N. H. 41; *Soltan v. Soltan*, 93 Mo. 307.

The decree of the district court is reversed, and the cause is remanded to said court, with instructions to enter a decree of foreclosure and sale only of the life estate of the defendant William H. Miles in the mortgaged premises and quieting the title to the property in the appellant, Laura Miles, subject to said estate by the curtesy.

Judgment accordingly.

The other judges concur. —

DEEDS—RECORDING—WHEN COMPLETE.—The duty of a party required to file a paper is complete when he has placed it in the hands of the proper custodian at the proper time and in the proper place: *Hook v. Fenner*, 18 Col. 283; 36 Am. St. Rep. 277, and note; *Beebe v. Morrell*, 76 Mich. 114; 15 Am. St. Rep. 298, and extended note. See, also, the notes to the following cases: *Bigelow v. Topliff*, 60 Am. Dec. 272; *Metts v. Bright*, 32 Am. Dec. 686, and *Nichols v. Reynolds*, 36 Am. Dec. 242.

RECORD—EFFECT OF DESTRUCTION OF.—After a deed has been duly recorded, the partial or total destruction of the record book containing it does not impair the lien or affect the record of it as legal notice: *Myers v. Buchanan*, 46 Miss. 397, cited in the note to *Alvis v. Morrison*, 14 Am. Rep. 120.

CURTSEY—WHETHER TENANT BY CAN CONVEY TITLE.—The interest of the husband as tenant by the curtesy initiate, prior to the abolition of the estate of curtesy was a legal estate which was assignable: *Metzler v. Miller*, 129 Ill. 630. A husband's curtesy is not forfeited by a conveyance in fee of his interest in the estate: *Wells v. Thompson*, 13 Ala. 793; 48 Am. Dec. 76; but a husband's curtesy initiate in his wife's lands cannot be sold to pay his debts: *Welsh v. Solenberger*, 85 Va. 441.

BETTS v. SIMS.

[25 NEBRASKA, 840.]

HOMESTEAD—SUBROGATION.—One who claims title to property in good faith but whose claim is invalid because the property was a homestead, and the wife did not join in the conveyance upon which his title rests, and who pays off a mortgage enforceable against the property, is entitled to be subrogated to the rights of the mortgagee and to have the mortgage revived and enforced for his benefit.

HOMESTEAD—SETOFF AGAINST CLAIMS FOR RENTS AND PROFITS OF.—If a husband and wife induce a person to purchase property and to pay therefor and to obtain a conveyance from a person whose title is invalid, because founded upon a conveyance of such property made by such husband without the joinder of his wife while it was their homestead, the amount so paid constitutes a valid setoff against their claim for the rents and profits of such property while occupied by such purchaser.

Hall, McCulloch, and English, for the plaintiffs in error.

Robert Ryan, for the defendant in error.

841 Post, J. This controversy had its inception in an action by the plaintiffs in error in the district court of Saline county to quiet their title to the property in controversy, to wit, a quarter section of land in said county, as against the defendants in error. They alleged in their petition that the defendants claimed title through a deed from George Betts which was void and insufficient to pass any title whatever, for the reason that said property was at the time in question the homestead of the said George Betts and his wife Eliza, who did not sign or join in the execution thereof. The defense relied upon was an estoppel as against both plaintiffs. On a final hearing the district court dismissed the petition for want of equity, and entered a decree for the defendant. An appeal was taken to this court, where the decree of the district court was reversed and judgment entered here for plaintiffs in accordance with the prayer of the petition: See *Betts v. Sims*, 25 Neb. 166. The facts involved in that controversy, so far as they are material to this, are fully stated in the opin-

ion cited above. Subsequently the defendant in error made application to this court for a modification of the decree against him so as to allow him to be subrogated to the rights of Charles Bidleman, who held a mortgage on the property in controversy, and which he, defendant, had paid in full while in good faith, relying upon his title through the aforesaid deed from George Betts. Said application was granted, but it appearing that an accounting would be necessary in order to fully determine the rights of the parties with respect to ⁶⁴³ said claim, the case was remanded to the district court for hearing upon amended pleadings. It is not deemed necessary to make an extended reference to the pleadings, as the findings and decree of the district court, which are set out below, are responsive to all the issues presented, and plainly indicate the contentions of the parties at the hearing. The findings and decree are as follows:

"And now on this twenty-fourth day of November, 1890, the same being a portion of the October term of this court, this cause came on to be decided upon the submission heretofore had of said cause, and the court, being now fully advised in the premises, finds that the findings of fact heretofore made by this court are, and each of them is, fully sustained by the evidence submitted upon this hearing. This court further finds that the defendant, F. L. Sims, believing in good faith that he was the owner at the time of the southeast quarter (S. E. $\frac{1}{4}$) of section eight (8), in township eight (8) north, range one (1) east, sixth (6) principal meridian, did, on the fourth day of March, 1883, pay off the amount due on a certain mortgage made on said premises by Joseph Brown to Charles Bidleman of date September 1, 1880, which said mortgage was duly filed for record in the office of the county clerk of Saline County, Nebraska, on September 24, 1880, and duly recorded in Mortgage Record No. 11, on pages 388 and 389 of said office. That said mortgage was made with the knowledge and assent and at the request of George Betts and Eliza Betts, and the proceeds were used for their benefit, and in making said mortgage the court finds that Joseph Brown was acting as the trustee of said George Betts and Eliza Betts. . . . That the amount so paid on March 4, 1883, by F. L. Sims was eleven hundred and fifty dollars, with eight per centum per annum interest thereon from the preceding first day of September, which interest so paid was in amount fifty-seven dollars, and that the said F. L. Sims is

entitled to be subrogated as to said ^{§43} mortgage and its lien, enforcement, and remedies in respect thereto to all the rights which the said Charles Bidleman could now assert if he held said mortgage unpaid and undischarged. The court therefore finds that F. L. Sims, as to said premises above described, is entitled to the relief by him prayed, and the foreclosure of said mortgage, as though in form assigned by Charles Bidleman to said F. L. Sims, and to an order of sale, under which said premises shall be sold to pay the amount above found due, to wit, the sum of eleven hundred and ninety-seven dollars, with interest thereon at eight per centum per annum to the present date, in all to this date the sum for which F. L. Sims is entitled to the relief as aforesaid is nineteen hundred and thirty-six $\frac{1}{100}$ dollars, to draw eight per centum interest per annum from this date. The court further finds that the said premises were conveyed by F. M. Patton to F. L. Sims with all his right, title, interest, claim that he held against George Betts and Eliza Betts and Joseph Brown as to the lands above described; that said George Betts and Eliza Betts requested, urged, and induced said F. M. Patton to purchase said premises from Joseph Brown and as part consideration to pay, and the said Patton did therefore pay, to said Brown for the use and benefit of, and upon the direction of, George Betts and Eliza Betts the sum of one thousand dollars (\$1,000) cash, and assuming the mortgage to Charles Bidleman for \$1,150; that said one thousand dollars was paid as aforesaid September 7, 1882, by F. M. Patton, and that as to the said sum of one thousand dollars F. L. Sims is entitled to be subrogated to the rights of his grantor, F. M. Patton, and to have computed interest thereon at the rate of seven per centum per annum, which sum of one thousand dollars and interest should be credited upon the amount found due in favor of George Betts and Eliza Betts as hereinafter stated. The court finds further that the said F. L. Sims should account for the rental value of the above premises from the time he took possession of the ^{§44} same until dispossessed by the decree of the supreme court, a period of six years, at the rate of one $\frac{1}{100}$ dollars per acre per year, or in all one hundred and eighty-four dollars per year, said rent being due at the end of each year, and to draw seven per centum interest from the said times, and the said Sims should also account for the granary removed from said premises at its fair value, which the court find to be one hundred dollars,

and for the stable removed, at its fair value, which this court finds to be ten dollars, and for the value of all trees removed from said premises, twenty-two $\frac{11}{100}$ dollars, and the court, being without reliable data upon which to figure the time for which Sims should pay interest on the three items last mentioned, assumes that it should be for three years at seven per centum per annum, which amounts to twenty-seven $\frac{37}{100}$ dollars. The court further finds that the above-named amounts (excluding the Bidleman mortgage) with seven per centum interest thereon should be treated as a setoff as to the one thousand dollars paid by F. M. Patton as above stated, with seven per centum interest thereon from the date of said payment, which was on September 7, 1882; that upon that basis the court finds that the said one thousand dollars, with seven per centum interest thereon from September 7, 1882, computed thereon, exceeds the total amount for which F. L. Sims should account as aforesaid, including interest thereon as above found due, but this court finds no prayer for relief in favor of F. L. Sims as to said excess on said premises nor for reimbursement for taxes paid or improvements made by Sims, and therefore finds that any relief on that score must be denied. It is therefore ordered, adjudged, and decreed by this court that F. L. Sims be entitled to be and is subrogated to the rights of Charles Bidleman, as to the southeast quarter (S. E. $\frac{1}{4}$) of section eight (8), township eight (8) north, range one (1) east, sixth principal meridian, as against George Betts and Eliza Betts and all parties claiming under or through them or either of them; ³⁴⁵ that the mortgage in favor of Charles Bidleman be declared in full force and virtue in favor of F. L. Sims by subrogation from September 1, 1880; that said mortgage be foreclosed as prayed, in favor of F. L. Sims for the amount now due thereon, which the court finds to be nineteen hundred and thirty-six $\frac{11}{100}$ dollars, to draw eight per centum per annum from this date."

The first point made in the brief of plaintiffs in error is that the order of this court modifying the decree in their favor did not include the so-called Patton claim; hence, the question whether the defendant should be subrogated to the rights of Patton with respect to money paid by the latter to Brown, his grantor, was not involved in the second hearing. It is not necessary to look to the order remanding the case for the issues, since the question of the defendant's right to offset the \$1,000 paid by Patton to Brown at the special in-

stance and request of the plaintiffs was distinctly raised by the pleadings in the supplemental proceeding.

2. The evidence before the district court was not preserved, hence the only question now open for consideration is whether the decree is warranted by the facts as found by the court. Of the right of the defendant to be subrogated to the equities of Bidleman there can be no doubt. From the findings of the court on the first hearing, which are set out at length in the opinion previously filed in the case, and which the court in this proceeding finds to be true, it appears that in the year 1876 the plaintiffs mortgaged the land in controversy to the New England Mortgage Security Company to secure the sum of \$600, borrowed by them, which indebtedness bore interest at the rate of ten per cent, and in the year 1877 they mortgaged said land to one R. S. Bentley to secure the sum of \$500, borrowed by them, which indebtedness bore interest at the rate of twelve per cent. Both plaintiffs signed and acknowledged the said mortgages. In the year 1880 plaintiffs procured ~~said~~ said Bentley, to whom the land had in the mean time been deeded as security, for the \$500 loan, together with other money advanced by him, to convey said land to Joseph Brown, who assumed said mortgages as part of the consideration therefor. Brown, after the conveyance to him, mortgaged the premises to Bidleman for \$1,150, with the proceeds of which he paid off and satisfied the two mortgages executed by plaintiffs. The defendant, who subsequently purchased from Patton, Brown's grantee, paid in full and caused to be satisfied of record the mortgage to Bidleman. Plaintiffs having invoked the equitable powers of the court must, as a condition to relief, discharge the obligation which in equity they owe to the defendant. "The rights of subrogation," says Chancellor Kent "is founded upon natural justice and is recognized in every cultivated system of jurisprudence"; *Cheebrough v. Millard*, 1 Johns. Ch. 412; 7 Am. Dec. 494. The court, therefore, did not err in awarding a decree of foreclosure for the amount of the Bidleman mortgage and interest thereon.

3. It is urged finally that the defendant was not entitled to be subrogated to the rights of Patton as to any claim for the \$1,000 paid by the latter to Brown, and that the district court erred in allowing that amount as an offset against the sum of \$1,236, found due them on account of rents and for waste by the defendant. By reference to the finding, set out above, it

appears that plaintiffs requested and induced Patton to purchase the premises from Brown and to pay the \$1,000 for their benefit and by their direction. It is further found that Patton conveyed said property to the defendant "with all his right, title, interest, and claim that he held against George Betts and Eliza Betts, as to the lands above described," etc. The facts as found amount to an assignment by Patton of whatever cause of action he may have had against plaintiffs, and which is available to the defendant in this action.

The next and only remaining question is that of the liability ²⁴⁷ of plaintiffs to Patton for the \$1,000 paid to Brown as part consideration for the property. By reference to the tenth finding, accompanying the original decree, it will be observed that plaintiffs were beneficially interested in the purchase of the land by Patton, that they were desirous of securing a part of the premises, but not having the necessary money, induced Patton to purchase it, agreeing to purchase a part of it from him at the price paid therefor to Brown. Construing the several findings together, it is apparent that the \$1,000 in question should in equity be treated as an advancement by Patton for plaintiffs and for their benefit, and for which they should account in this action. It is not contended that this claim could be made a lien upon the property, nor is there a prayer for judgment for the excess remaining in defendant's favor after allowing plaintiffs credit for the amount found in their favor. The claim for rents of the property and for waste committed thereon does not partake of the character of the homestead, and is not shown to be exempt on other grounds. The decree is right and is affirmed.

MAXWELL, C. J. concurs.

NORVAL, J., not sitting. —

SUBROGATION—RIGHT TO WHEN ARISES.—The right of subrogation is founded upon the principles of equity and justice and is intended to afford protection to the meritorious creditor, and to prevent the sweeping away of the fund from which, in good conscience, he ought to be paid: *Spalding v. Harvey*, 129 Ind. 106; 28 Am. St. Rep. 176, and note; *Budd v. Oker*, 148 Pa. St. 194; *Oason v. Connor*, 83 Tex. 26; *Emmert v. Thompson*, 49 Minn. 286; 32 Am. St. Rep. 566. See, also, *Backer v. Pyne*, 130 Ind. 288; 30 Am. St. Rep. 231, and note; notes to *Ex parte Hardin*, 27 Am. St. Rep. 830; *Regan v. New York etc. R. R. Co.*, 25 Am. St. Rep. 320, and *Johnson v. Barrett*, 10 Am. St. Rep. 87.

ELDRIDGE v. AULTMAN.

[35 NEBRASKA, 384.]

JUDGMENT.—AN ACTION LIES ON A DOMESTIC JUDGMENT though it may also be enforceable by execution.

H. H. Blodgett, for the plaintiffs in error.

Davis and Hibner, for the defendants in error.

§84 NORVAL, J. The petition filed in the court below contains two counts. In the first it is alleged, in substance and effect, that defendant in error recovered a judgment against plaintiffs in error before B. H. Turner, a justice of the peace of Fillmore county, for the sum of \$70.95 and costs, taxed at \$3.20; that a transcript of said judgment has been duly filed in the office of the clerk of the district court of Fillmore county; that the defendant in error has paid the above costs in full, and there is due and unpaid on said judgment the sum of \$74.15, and interest.

For a second cause of action it is averred that the defendant in error recovered a judgment against plaintiffs in error before John Barsby, a justice of the peace within and for Fillmore county, for \$30.85, and costs of suit, taxed at \$2.90; that a transcript of said judgment has been duly filed in the district court of said county; that defendant in error has paid all of said costs; that plaintiffs in error have never paid said judgment, or any part thereof, except \$15.90, and that there is due upon said judgment \$16.35, and interest thereon. The prayer is for a money judgment.

§85 To the petition the plaintiffs in error, defendants below, filed a general demurrer, which was overruled by the court, and they electing to stand upon their said demurrer, judgment was rendered against them and in favor of plaintiff below, in accordance with the prayer of the petition.

Counsel in the brief of the plaintiffs in error assumes that this is an action to revive dormant judgments, and argues therefrom that as the original judgments were obtained in Fillmore county, proceedings to revive them must be brought in that county, and in the court in which they were rendered; therefore the district court of Lancaster county had no jurisdiction of the subject matter. No such question was presented to the court below; besides counsel is in error in supposing that this is an action of revivor. This in no sense such a proceeding. The object and purpose of the suit is to recover a

new judgment for the amount due and unpaid on the original judgments described in the petition. Hence it is unnecessary to decide whether an action to revive a judgment can be brought in a county other than that in which the judgment was rendered.

The sole question presented for decision is: Can a suit be maintained on a judgment recovered in this state? At common law an action lies on a domestic judgment, and there is no statutory provision in this state which takes away that right. True, a domestic judgment may be enforced by execution, but such remedy is not exclusive. It is merely cumulative. A judgment, whether foreign or domestic, is a debt of a high order, and a recovery may be had upon it as upon any other contract. While there is some conflict in the decisions, the proposition stated is sustained by the great weight of authority in this country: *Black on Judgments*, sec. 958; *McDonald v. Butler*, 3 Mich. 558; *Headley v. Roby*, 6 Ohio, 521; *Burnes v. Simpson*, 9 Kan. 658; *Hummer v. Lamphear*, 32 Kan. 439; 49 Am. Rep. 491; *Ames v. Hoy*, 12 Cal. 11; *Stuart v. Lander*, 16 Cal. 372; 76 Am. Dec. 538; *Davidson v. Nebaker*, 21 Ind. 334; 83 Am. Dec. 350; *Becknell v. Becknell*, 110 Ind. 42; *Greathouse v. Smith*, 4 Ill. 541; *Denison v. Williams*, 4 Conn. 402; *Ives v. Finch*, 28 Conn. 112; *Kingsland v. Forrest*, 18 Ala. 519; 52 Am. Dec. 232; *Elliott v. Holbrook*, 33 Ala. 659; *Church v. Cole*, 1 Hill, 645; *Wilson v. Hatfield*, 121 Mass. 551; *Stewart v. Peterson*, 63 Pa. St. 280; *Haven v. Baldwin*, 5 Iowa, 508; *Simpson v. Cochran*, 23 Iowa, 81; 92 Am. Dec. 410; *Thomson v. Lee County*, 22 Iowa, 206.

It follows from what has been said that the petition states grounds for action, and that the court did not err in overruling the demurrer.

The judgment is affirmed.

The other judges concur. —

JUDGMENTS—ACTIONS ON DOMESTIC.—An action may be maintained on a domestic judgment while it is in full force and effect, although at the time of bringing his action plaintiff was entitled to an execution on the judgment: *Simpson v. Cochran*, 23 Iowa, 81; 92 Am. Dec. 410, and note; *Hummer v. Lamphear*, 32 Kan. 439; 49 Am. Rep. 491; *Davidson v. Nebaker*, 21 Ind. 334; 83 Am. Dec. 350, and note; notes to *Kingsland v. Forrest*, 52 Am. Dec. 234; *Evans v. Tatem*, 11 Am. Dec. 723; and *Lee v. Giles*, 21 Am. Dec. 479.

CASES

IN THE

SUPREME COURT

OF

NEVADA.

WALCOTT v. WELLS.

[11 NEVADA, 47.]

PROHIBITION—NATURE OF THE WRIT GENERALLY.—A writ of prohibition should not be granted except in cases of usurpation or abuse of power, and not then unless the other remedies provided by law are inadequate to afford full relief.

PROHIBITION—WHEN THE WRIT DOES NOT LIE.—Errors of an inferior court in the exercise of its admitted jurisdiction, as in dismissing a case, or deciding that it has been transferred to a federal court, are properly reviewable on appeal and do not justify a resort to the extraordinary remedy of prohibition.

PROHIBITION, QUESTIONS NOT REVIEWABLE IN PROCEEDINGS TO OBTAIN WRIT OF.—The question whether a case has been transferred from a state to a federal court can be finally determined only in the latter court, and therefore cannot be raised in proceedings to obtain from the supreme court of the state a writ of prohibition to restrain the trial of the case in the state court, from which it is alleged to have been transferred.

PROHIBITION, TITLE TO OFFICE NOT TRIABLE IN PROCEEDINGS TO OBTAIN WRIT OF.—The validity of the acts of an officer *de facto* cannot be questioned by an application for a writ of prohibition to restrain those acts, but only by a direct proceeding in *quo warranto* to determine his right to hold the office.

OFFICES CREATED BY UNCONSTITUTIONAL LAW, PERSONS FILLING ARE USURPERS.—An office which it is attempted to create by an unconstitutional law has no legal existence, and is without any validity. Any person who undertakes to fill such a pretended office, whether by appointment or otherwise, is a usurper, whose acts are absolutely null and void, and may be questioned by any private suitor, in any kind of an action or proceeding.

OFFICER DE FACTO, WHO IS.—An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the pub-

He and third persons, where the duties of the office were exercised; 1. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; 2. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; 3. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise; such ineligibility, want of power, or defect being unknown to the public; 4. Under color of an election or appointment by, or pursuant to, a public unconstitutional law, before the same is adjudged to be such.

OFFICE, TITLE TO, WHEN NOT COLLATERALLY IMPREACHABLE.—Where an office has been legally created, and the illegality, if any, of the incumbent's tenure consists merely in the fact that his appointment was an attempt to fill such office in a way not authorized by law, he will, if his right to perform the duties of the office has been generally acquiesced in and recognized by the public, be deemed a *de facto* officer, and therefore his title cannot be indirectly questioned in a proceeding to obtain a writ of prohibition to prevent him from doing an official act.

APPLICATION for a writ of prohibition.

A. C. Ellis, for the petitioner.

Wren and Cheney, and Henry Rives, for the respondent.

50 **HAWLEY, C. J.** This is an application by the petitioner for a writ of prohibition to prevent the trial of the case of *Walcott v. Watson*, in the district court of White Pine county.

1. Petitioner claims that the court has no jurisdiction to try the case: 1. Because it has been dismissed; 2. That if not dismissed, it has been transferred to the circuit court of the United States.

The writ of prohibition is an extraordinary remedy, and should be issued only in cases of extreme necessity. Before it should issue, it must appear that the petitioner has applied to ⁵¹ the inferior tribunal for relief. The object of the writ is to restrain inferior courts from acting without authority of law in cases where wrong, damage, and injustice are likely to follow from such action. It does not lie for grievances which may be redressed in the ordinary course of judicial proceedings, by appeal. It is not a writ of right, but one of sound judicial discretion, to be issued or refused according to the facts and circumstances of each particular case. Like all other prerogative writs, it is to be used with caution and forbearance, for the furtherance of justice, and securing order and regularity in judicial proceedings in cases where none of

the ordinary remedies provided by law are applicable. The writ should not be granted except in cases of a usurpation or abuse of power, and not then, unless the other remedies provided by law are inadequate to afford full relief. If the inferior court has jurisdiction of the subject matter of the controversy and only errs in the exercise of its jurisdiction, this will not justify a resort to the extraordinary remedy by prohibition.

The district court has unquestioned jurisdiction of the subject matter of the action of *Walcott v. Watson*. Petitioner, after submitting her cause to the jurisdiction of that court, sought to dismiss the action. A controversy arose as to whether or not the action was dismissed before the filing of defendant's answer setting up a counterclaim. This was a question for the district court to decide. It may have erred in deciding it adversely to petitioner; but if it did, the petitioner would have redress by an appeal to this court, if the final judgment should be rendered against her. The same principle applies to the second ground relied upon. It was within the jurisdiction of the court to determine whether or not the case had been transferred. If the court erred in its ruling upon this question, petitioner could have redress in the same manner, by appeal, or she might apply by petition to the circuit court of the United States to have the case transferred—a proceeding involving but little, if any, greater expense or delay than will be incurred by this application. Moreover, that question ought not to be raised by this extraordinary remedy in this court. The decision thereon would not be final. If it was considered and decided by this court that the cause was transferred, the circuit court might, when it came up in that court, decide otherwise, and send it back to the state court for trial. It is a principle ⁵³ which lies at the very foundation of the law of prohibition that the jurisdiction is strictly confined to cases where no other remedy exists; and it has always been held to be a sufficient reason to refuse to issue the writ where it clearly appears that the petitioner therefor has another plain, speedy, and adequate remedy at law.

In *Mastin v. Sloan*, 98 Mo. 252, after a temporary injunction was dissolved in an action brought by an administrator, the defendant therein moved for an assessment of damages on the injunction bond. During the proceedings a new administrator was substituted. One of the sureties on the injunc-

tion bond instituted this proceeding, and applied for a writ of prohibition to prevent the court from proceeding any further upon the motion for damages, on the ground that the original suit had abated, and the jurisdiction of the court terminated. The court said: "This is plainly no case for the issuance of a writ of prohibition. Should the trial court enter a finding and judgment for damages against petitioner and the other sureties on the injunction bond, any one of them aggrieved may review that result by appeal or writ of error, on taking proper steps to that end. Any error that the court may make in determining the proper limits of its jurisdiction in the premises can be effectively corrected by any of the usual modes of reviewing judgments. The writ of prohibition should issue only in circumstances where the ordinary remedies are inadequate to the ends of justice. Where, as here, an appeal or writ of error furnishes a complete and effective remedy for an error of the court below prejudicial to the rights of a party, this extraordinary remedy should be denied": See, also, *People v. District Court*, 11 Col. 574; *Buskirk v. Judge Circuit Court*, 7 W. Va. 91; *Fleming v. Commissioners*, 31 W. Va. 619; *Supervisors v. Wingfield*, 27 Gratt. 333; *State v. Houston*, 40 La. Ann. 393; 8 Am. St. Rep. 532; *State v. Rightor*, 40 La. Ann. 839; *Wilson v. Berkstresser*, 45 Mo. 283; *People v. Westbrook*, 89 N. Y. 152; *Turner v. Mayor etc.* 78 Ga. 687; *People v. Wayne Circuit Court*, 11 Mich. 403; 83 Am. Dec. 754; *People v. Hills*, 5 Utah, 410; *Powelson v. Lockwood*, 82 Cal. 615; High on Extraordinary Legal Remedies, sec. 765 et seq.

2. Petitioner next contends that the writ should be issued to prohibit respondent, Wells, from acting as judge upon the trial of said cause, upon the ground that he is not one of the ^{ss} district judges authorized to try cases in the district court of the state of Nevada; that he is acting as a judge without any authority of law; that he has in defiance of law and without any jurisdiction, "usurped the authority and power to try said cause, in that the law under which he was appointed and commissioned by the governor is wholly void, and of no effect."

On the other hand it is claimed that the right of respondent, Wells, to exercise and perform the functions of a district judge, and his title to the office of district judge, cannot be raised, tried, or determined in this proceeding; that the constitutionality of the act of the legislature under which he was

appointed to the office is not involved, and cannot be attacked, and should not be considered or decided herein; that the validity of the act, in so far as it involves respondent's title to the office, can only be considered and determined in proceedings in the nature of *quo warranto*, instituted, as provided by statute, for the purpose of determining his right to hold said office; that until such a proceeding is instituted, and until it is decided therein that he has no right or title to the office, he is, as to third persons and the public, at least, a *de facto* officer; and that all his acts as such are valid and binding, and that there is no valid reason why he should not be permitted to try petitioner's case, as well as the cases of other litigants pending in the court over which he presides. Which contention is correct? First let us consider the facts upon which the respective claims are based.

The act supplemental to, and amendatory of, an act entitled "An Act to redistrict the state," etc., approved March 4, 1885, was approved March 12, 1889; and section 1 of said act reads as follows: "The number of district judges in the judicial district of the state of Nevada shall, from and after the passage of this act, be four; and the governor of said state shall, immediately upon the passage of this act, appoint a district judge from said judicial district to hold such office under such appointment until the next general election, when four district judges from said judicial district shall be elected": Stats. of 1889 '92. There was at the time of the passage of this act a district court legally constituted, constitutionally organized, and existing by virtue of law, to be held in every county of the state. The office of district judge also legally existed. There was but one judicial district for the entire state, but one district court, and one judicial officer in connection therewith to be ⁵⁴ filled, to wit, the office of district judge of the district court of the state of Nevada. This office was then filled by three district judges, each having equal and coextensive and concurrent jurisdiction and power throughout the state to hold the district court in any county, and to exercise and perform the powers, duties, and functions of the court, and all other duties pertaining to the office of district judge. These judges were authorized to elect a presiding judge, who had, among other things, the power to direct the district judges to hold court in the several counties as the public business might require: Stats. of 1885, 60; *State v. Atherton*, 19 Nev. 332.

The legislature, in 1889, deeming it to be necessary for the proper and speedy transaction of judicial business in the district court, and believing that they were authorized to increase the number of district judges, passed the act in question, authorizing the governor to appoint another judge. This act did not create any new court or new officer. It simply provided for an increase of judges. There were to be more officers—an additional district judge to preside in the district court, and perform the functions and exercise the powers of a district judge throughout the state. The governor, pursuant to the provisions of the supplemental act, appointed and commissioned the respondent as a district judge. There was no first, second, third, or fourth judge. But there were four district judges, each commissioned to fill the one office of district judge; each, apparently at least, authorized to hold court, not in any particular county, but in each and every county in the state. We are bound to take judicial notice of the fact that after respondent was commissioned and sworn into office he was assigned by the presiding judge of the judicial district to hold the district court in the county of White Pine, and certain other counties; that immediately thereafter he commenced to discharge the duties pertaining to the office of district judge; and that for more than a year past he has been recognized by the state and county officers, and by the people of this state, as one of the district judges, and that his right to perform the duties of the office of district judge, and receive the salary pertaining thereto, has never been questioned until this proceeding was instituted. It is a general rule, of universal application, that the acts of an officer *de facto* are valid and binding as to third persons and the public, and cannot be questioned except in a ⁵⁵ direct proceeding instituted for that purpose by *quo warranto*.

In *Coyle v. Commonwealth*, 104 Pa. St. 180, the defendant, on trial for murder, contended that the judge was acting under an unconstitutional law, and that he had no jurisdiction to try the case. The supreme court said: "The question sought to be raised by the prisoner's special plea to the jurisdiction is not properly before us. The rightful authority of a judge, in the full exercise of his public judicial functions, cannot be questioned by any merely private suitor, nor by any other, excepting in the form especially provided by law. A judge *de facto* assumes the exercise of a part of the prerogative of sovereignty, and the legality of that assumption is

open to the attack of the sovereign power alone. If the question may be raised by one private suitor, it may be raised by all; and the administration of justice would, under such circumstances, prove a failure. It is not denied that Judge McLean was a judge *de facto*, and if so, he is a judge *de jure* as to all parties except the commonwealth. The attorney general, representing the sovereignty of the state, by a writ of *quo warranto*, might properly present this constitutional question for our consideration, but it cannot come before us from any other source, or in any other form": See also, to the same effect, *Clark v. Commonwealth*, 29 Pa. St. 129; *Commonwealth v. McCombs*, 56 Pa. St. 436; *People v. Sassovich*, 29 Cal. 485; *Buckner v. Veuve*, 63 Cal. 304; *Carlton v. People*, 10 Mich. 251; *People v. White*, 24 Wend. 524; *Fowler v. Bebee*, 9 Mass. 231; 6 Am. Dec. 62; *Sheehan's Case*, 122 Mass. 445; 23 Am. Rep. 374; *Commonwealth v. Taber*, 123 Mass. 253; *In re Boyle*, 9 Wis. 264; *State v. Bloom*, 17 Wis. 521; *Ex parte Johnson*, 15 Neb. 512; *Trumbo v. People*, 75 Ill. 565; *State v. Meehan*, 45 N. J. L. 192; *State v. Vickers*, 51 N. J. L. 180; 14 Am. St. Rep. 675; *Keith v. State*, 49 Ark. 442; *State v. Fuller*, 96 Mo. 167; *In re Cleveland*, 51 N. J. L. 311; *Jewell v. Gilbert*, 64 N. H. 14; 10 Am. St. Rep. 357; *Baker v. State*, 69 Wis. 37; *Hull v. Superior Court*, 63 Cal. 177.

But petitioner contends that respondent is not a *de facto* officer; that the conditions necessary to constitute such an officer do not exist; that there is no office to be filled; that it is a legal impossibility for a fourth judge to fill the office of district judge, "because the office has always been full," and that for these reasons the rule above stated has no application to this case. We admit that there can be no officer, either *de jure* or *de facto*, if there be no office to fill; that an office attempted to be created ⁵⁶ by an unconstitutional law has no legal existence, is without any validity, and that any person attempting to fill such a pretended office, whether by appointment or otherwise, is a usurper, whose acts would be absolutely null and void, and could be questioned by any private suitor, in any kind of an action or proceeding. It would be a misnomer of terms to call a person an "officer" who holds no office. A public office cannot exist without authority of law. An office cannot be created by an unconstitutional act, for such an act is no law. It confers no rights, imposes no duties, affords no protection, furnishes no shield, and gives no authority. It is in legal contemplation to be

regarded as never having been possessed of any legal force or effect, and is always to be treated as though it never existed: *State v. Tuffy*, 20 Nev. 428; 19 Am. St. Rep. 374; *Norton v. Shelby Co.*, 118 U. S. 442. If, therefore, the contention of counsel for petitioner has any solid foundation for its support, the conclusions to be drawn therefrom should be sustained. But if the contention is wholly unsupported and unwarranted by the facts, then the entire fabric upon which the claim is made must fall, it having nothing to support it.

The case of *Ex parte Roundtree*, 51 Ala. 42, wherein a writ of prohibition was issued to a circuit judge to prohibit him from proceeding in a case, is relied upon by petitioner's counsel to sustain his position. That case, however, is wholly different in its facts, and is plainly distinguishable from this. There, the legislature of Alabama passed an act, by its terms creating a new court, to be known as the "law and equity court of Morgan county," and provided "that the judge of the fourth judicial circuit of Alabama shall be the judge of said court of law and equity." This act was held to be unconstitutional because it took from the qualified electors of Morgan county the power of electing a judge. The court attempted to be created by an unconstitutional law had no legal existence. Here, the district court in which respondent is presiding had a legal existence prior to, and at the time of, his appointment, and was not created by virtue of the act authorizing his appointment. We refer to two other decisions, similar to the Alabama case, for the purpose of illustrating the particular character of cases to which the argument of petitioner's counsel would apply, and to show the distinction in the facts between such cases and the one under consideration.

⁵⁷ The legislature of Kentucky attempted in an unconstitutional manner to abolish the constitutional court of appeals, and to create a new court of appeals, in direct violation of the plain provisions of the constitution of the state. The constitutional court of appeals, in *Hildreth v. McIntire*, 1 J. J. Marsh. 206, 19 Am. Dec. 61, held that there could be but one court of appeals, and that such a thing as a *de facto* court of appeals could not exist under the constitution, and as no such court existed, the gentlemen appointed to preside over such a court were not *de facto* officers. In *Norton v. Shelby Co.*, 118 U. S. 426, on writ of error from the supreme court of Tennessee to the supreme court of the United States, the legislature had attempted, by an unconstitutional act, to abolish

what was known as the "quarterly court," composed of the justices of the peace of Shelby county, and to create in its stead a board of commissioners consisting of three members, it was held that as this board of commissioners never had a lawful existence, the members thereof were not *de facto* officers, and that all the acts of the pretended board were null and void. The distinction in the facts between the cases referred to and the present one is so clear, plain, and manifest, that no one ought to be misled in applying the legal principles which control the respective class of cases. In each of the cases referred to no court or office known to the law existed to be filled by anyone. Here the court and the office existed by virtue of the constitution and a valid law. There the right of the pretended officers to perform the functions of the pretended office was not admitted by anyone, but, on the contrary, was directly disputed and drawn in question when the respective persons attempted to act. In *Norton v. Shelby Co.*, 118 U. S. 426, the members of the quarterly court not only denied the right of the supervisors to act, but instituted proceedings by *quo warranto* to remove them from office; and such proceedings were pending in the courts at the time the acts under review in that case were performed. Here the right of respondent to act as district judge was never disputed, and his authority to act was publicly recognized and acquiesced in.

What constitutes a *de facto* officer? This court, in *Mallett v. Uncle Sam etc. M. Co.*, 1 Nev. 197, 90 Am. Dec. 484, said that an officer *de facto* is on the one hand distinguished from a mere usurper of the office, and on the other hand from an officer *de jure*. In *Meagher v. Storey Co.*, 5 Nev. 245, it was said that acts performed ⁵⁸ by a city recorder as a committing magistrate, though the statute authorizing him to so act is unconstitutional and void, are to be regarded as the acts of a *de facto* officer, and valid as to third persons and the public. In *State v. Curtis*, 9 Nev. 338, we had occasion to examine and discuss to a limited extent the question as to what constitutes an officer *de facto*. The rules taken from the authorities were there announced as follows: 1. One who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law; 2. One who actually performs the duties of an office, with apparent right, and under claim and color of an appointment or election; 3. One who has the color of right or title to the office he exercises; 4. One who has the apparent title of an officer *de jure*.

In *State v. Carroll*, 38 Conn. 471, 9 Am. Rep. 409, Chief Justice Butler gave the following complete definition of a *de facto* officer: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised: 1. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; 2. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; 3. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; 4. Under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such." This definition has been accepted, approved, and followed in its entirety in all the numerous subsequent cases where the question has been discussed, and was referred to with approbation by this court in *State v. Blossom*, 19 Nev. 317.

In *Taylor v. Skrine*, 3 Brev. 516, decided in 1815, it was sought to set aside ⁵⁹ a decree on the ground that it was made by a person who was not constitutionally qualified to preside as judge. There was an act in South Carolina authorizing the governor to appoint and commission some fit and proper person to sit as judge in case any of the judges on the circuit should happen to be sick or unable to hold the court in his circuit. The judge who made the decree was appointed pursuant to the provisions of that act. After the rendition of the decree the act was declared void by a decision of the supreme court. The question was whether all the acts of the judge so appointed were necessarily void. The court in answering this question said: "The judge in this case acted under color of legal authority. He had a commission under the seal of the state, signed by the governor, and authorized by an act of the legislature. . . . The public acts of officers *de facto* are often valid, although the authority under which they act is void. Public convenience as well as

public justice requires that they should be supported. It would lead to incalculable mischief if all the proceedings under the several judges who have been thus appointed should be declared null and void."

The cases of *State v. Carroll*, 38 Conn. 471, 9 Am. Rep. 409, and *Ex parte Strang*, 21 Ohio St. 610, are similar in their facts to that of *Taylor v. Skrine*, 3 Brev. 516, the difference being only that in the South Carolina case the law authorizing the appointment of a temporary judge had been declared unconstitutional before the decision in *Taylor v. Skrine*, 3 Brev. 516, was rendered, and in the other cases the court declined to pass upon the constitutional question, holding it to be unnecessary so to do, as the temporary presiding judge was at least a *de facto* officer, and that his acts were valid and binding as to the public and third persons. We are of opinion that the facts of the present case bring respondent clearly within the definition of a *de facto* officer, as given in *State v. Curtis*, 9 Nev. 338, and *State v. Carroll*, 38 Conn. 471, 9 Am. Rep. 409, even if the act authorizing his appointment is unconstitutional, and that the case comes clearly within the principle of law as stated in the three cases above quoted from or referred to. In those cases the office was full. There was no vacancy. The law authorizing the appointment of a temporary judge had either been declared unconstitutional, or, for the purpose of the decisions, admitted to be unconstitutional. The temporary judge acted in the place of the judge *de jure*, under color of authority derived from an unconstitutional statute by virtue of his commission, etc. Here respondent did not take the place of either of the three other judges, for there was no separate place for either to fill, except by the assignment of the presiding judge. He was acting by virtue of his commission, in his own right by the consent of the other judges, and was assigned to the place by the presiding judge, and was the only judge presiding in the district court of the state in and for the county of White Pine. He acted as a district judge, filled the office, and presided in court, under as much color of authority as either of the temporary judges in the cases referred to. Why should not the same shield of protection to the public be given to his acts?

"The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and in-

dividuals whose interests may be effected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions. For the good order and peace of society, their authority is to be respected and obeyed until, in some regular mode prescribed by law, their title is investigated and determined. It is manifest that endless confusion would result if, in every proceeding before such officers, their title could be called in question": *Norton v. Shelby Co.*, 118 U. S. 441.

In *Leach v. People*, 122 Ill. 420, the legislature having passed an act in violation of the constitution of the state of Illinois, taking the management of county affairs under township organizations from the supervisors of the several towns, consisting of fifteen members, and vesting the same in a board of supervisors consisting of only five members, it was contended, as it is contended here, that there was no *de jure* office for the supervisors to fill; and *Norton v. Shelby Co.*, 118 U. S. 441, was relied upon to sustain this position. Chief Justice Sheldon, speaking for a majority of the members of the supreme court, in answer to this contention said: "Whatever township organization prevails, there is in every county a board of supervisors for the transaction of the affairs of the county. The act in question merely changed the number of the members of the board from fifteen to five, and the mode of election from towns ^{or} singly to two or more unitedly, and the term of office. Nothing was added to, or taken from, the powers or duties of the board.

After the passage of the act there still remained the board of supervisors of Wayne county, the official body for the management of the county's affairs, and the persons elected as members under the act went on, under the sanction of the statute, and exercised the powers and duties of the board of supervisors of Wayne county without question. There was no rival board, but it was the sole acting board of supervisors in Wayne county." There was all the while the legally established office or official body of the board of supervisors. It appeared in that case that the new members of the board were elected in pursuance of the act, and entered upon the duties of their office, and went on and exercised the powers and duties of the board of supervisors of Wayne county for years, without question of their right to do so. They had the sole

management and transaction of the affairs of the county, and did all the official legislative business of the county (just as respondent, Wells, had the sole management of the affairs of the district court in White Pine county, and did all the judicial business of the county that was done). There was no other official body ready and willing to do it. Upon this state of facts, the court said: "They were recognized and acquiesced in by all the public as the board of supervisors of Wayne county; and to hold their acts to be invalid would be most disastrous to the public interest and that of individuals who were justified in relying upon their acts as the acts of the board of supervisors of the county. There are present here all the elements which, from considerations of public policy, and for the avoiding of public inconvenience, have been recognized as going to make up the character of *de facto* officers, whose acts should be held valid as officers by virtue of an election as such, under an act of the legislature; reputation of being public officers, and public belief of their being such; public recognition thereof, and public acquiescence therein; an action as such unquestioned, during a series of years, with no other body ready and willing to act as the board of supervisors. We are therefore of opinion that this act . . . in relation to the board of supervisors of Wayne county, even if it be unconstitutional, was sufficient to give color of title that the official board, elected and acting under the law, were officers *de facto*, and ^{as} that their acts should be held valid so far as the public and third persons are concerned.

In *State v. McMartin*, 42 Minn. 30, there was an act of the legislature establishing a justice's court in one of the wards of the city of St. Paul, and providing for the election of such justice at the next general city election. There was a section of the act authorizing the mayor of the city to appoint the first justice to hold the office until the next election. Respondent, McMartin, was occupying the office and performing its duties, under appointment by the mayor, pursuant to the provisions of this act. A civil action was commenced in the court, and the defendant therein applied for a writ of prohibition to restrain McMartin from proceeding in the action on the ground that he was not a justice of the peace, and had no authority to act as such for the reason that the provision of the act assuming to confer the power on the mayor to fill the office by appointment is unconstitutional. The court said: "This part of the act is entirely separate and distinct from

the provisions creating the court or office, and hence, even assuming that the former is invalid, the latter are valid. We have, then, a case where the court or office was legally created; and the illegality, if any, consists in an attempt to fill it by appointment for the period indicated in a way not authorized by the constitution. On these facts, according to all the authorities, the respondent is a justice *de facto*. That his title to the office cannot be tried on a writ of prohibition, but only on information in the nature of *quo warranto*, is too well settled to require discussion." Counsel in that case, as well as in the case under consideration, argued that petitioner had no other available remedy for the wrong and injustice that was about to be done him, and that inasmuch as there must be a remedy for every wrong, therefore a writ of prohibition ought to be issued. But said the court: "The fallacy consists in the assumption that relator is threatened with any wrong. Respondent being a justice *de facto*, his acts are as valid as if he was a justice *de jure*. In fact, as to everybody except the state, in proceedings by *quo warranto* to test his right to the office, he is, in effect, a justice *de jure*."

In support of the views we have expressed we cite the following additional authorities: *Rives v. Pettit*, 4 Ark. 582; *In re Ah Lee*, 6 Saw. 410; *Campbell v. Commonwealth*, 96 Pa. St. 344; ⁶³ *Brown v. Lunt*, 37 Me. 429; *Dugan v. Farrier*, 47 N. J. L. 385; *Carli v. Rhener*, 27 Minn. 293; *In re Parks*, 3 Mont. 431; *Fitchburg R. R. Co. v. Grand Junction R. R. etc. Co.*, 1 Allen, 557; *Petersilea v. Stone*, 119 Mass. 467; 20 Am. Rep. 335; *Clark v. Easton*, 146 Mass. 45; *People v. Staton*, 73 N. C. 546; 21 Am. Rep. 479; *Hamlin v. Kassafer*, 15 Or. 458; 3 Am. St. Rep. 176.

The contention of petitioner's counsel "that, when a law is unconstitutional under which a person claims to exercise authority, that such authority may be attacked and disregarded in any form of proceedings," is not sustained by reason or authority. The legal existence of the district court of the state of Nevada, and of the office of district judge of said court, cannot be questioned. Neither the court nor the office was created by the act which is claimed to be unconstitutional. The question raised in this proceeding is not, therefore, one touching the jurisdiction of the court; but it is an inquiry into the right of a particular person to hold the office of district judge, which is a question absolutely distinct from that of the jurisdiction of the court. The only question that is

before us for consideration, is whether or not the reputed or colorable authority required by law to constitute an officer *de facto* can be derived from an unconstitutional statute.

From a review of the authorities bearing directly on the question, it clearly appears that it is sufficient if the officer claims and holds the office under some power having color to appoint, and that a statute, though it should be found repugnant to the constitution, will give such color.

The question of the constitutionality of the act increasing the number of district judges to four will not be considered. It is not properly before us for decision. It was not discussed by counsel for respondent, and is simply assumed to be unconstitutional by petitioner's counsel. This question, in so far as respondent's right to hold the office of district judge is concerned can only be raised in a direct proceeding, by *quo warranto*, to determine by what authority he exercises the right.

The alternative writ of prohibition heretofore issued in this case is vacated, and the temporary writ asked for denied.

MURPHY, J., concurring. I was not present, and did not hear the oral arguments made by the attorneys on the hearing for the writ. But from an ^{ex} examination of the briefs filed, and all the authorities having any bearing upon the subject, I am of the opinion that the application for the writ should be denied.

I therefore concur in the opinion of Chief Justice Hawley.

BELKNAP, J., dissenting. At the session of 1885 the legislature constituted the state one judicial district, and provided that there should be three judges of the district court. Pursuant to this law, three judges were elected at the general election of 1886 for the term of four years. Their terms will not expire by limitation until the first Monday in January, 1891. At the session of 1889 the legislature enacted that the number of district judges should be increased to four, and authorized the governor of the state to forthwith appoint a fourth judge. Respondent was commissioned under this authority in the month of March, 1889. This enactment, in so far as it attempts to increase the number of district judges during the term of the judges elected in 1886, is in direct violation of the provisions of the constitution, which require that the number shall not be increased or diminished "except in the case of a vacancy, or upon the expiration of the term of an

incumbent of the office": Const., art. 6, sec. 5. The enactment, being unconstitutional and void in the respect stated, created no office or judgeship to be filled. It was as inoperative as though it had never been passed. No *de jure* judge could be created by virtue of its provisions; and, if there could be no *de jure* judge, there could be no *de facto* judge, for the reason that the *de facto* doctrine presupposes provision by law for a *de jure* officer. It is considered, however, by the majority of the court, that if the law of 1889 be unconstitutional, the office of the district judge created by the constitution and laws passed in pursuance thereof remains; that respondent is an incumbent of this office, and therefore a *de facto* officer. In my view the case does not admit of the application of the *de facto* doctrine.

At the time of respondent's appointment the office of district judge was, and continuously since has been, filled by the three judges before mentioned. A *de facto* officer, as the term applies, is one who is, in fact, the officer. It is evident that there is no room for such an officer if the number of officers fixed by the law are in the actual possession of the office: *McCahon v. Commissioners*, 8 Kan. 437; *Boardman v. Halliday*, 10 Paige, 232; *Morgan v. Quackenbush*, 22 Barb. 80; *Cohn v. Beal*, 61 Miss. 399; *State v. Blossom*, 19 Nev. 312.

The cases cited by the chief justice fall short, it seem to me, of establishing the conclusion that respondent is a *de facto* officer. In *State v. Carroll*, 38 Conn. 471, 9 Am. Rep. 409, *Taylor v. Skrine*, 3 Brev. 516, and *Ex parte Strang*, 21 Ohio St. 610, the legal incumbent was temporarily incapable of discharging the duties of the office, and had surrendered it and its instrumentalities to the possession of the appointee. There was, therefore, in each of these cases, a vacancy, or that which was tantamount to one. In *State v. McMartin*, 42 Minn. 30, the office was vacant when the appointment was made. In *Leach v. People*, 122 Ill. 420, the legislature had passed an unconstitutional act, providing for the election of a board of supervisors for the management of the affairs of Wayne county, consisting of five members only, instead of fifteen. "The real cause of complaint," said the court in its opinion, "is that the office legally existing was illegally filled." The question in all of these cases was whether an officer appointed or elected under an unconstitutional act to a vacant office was a *de facto* officer. This question is not in-

volved in the present case, because there was no vacancy in the legal organization of the court to be filled.

I think respondent should not be considered a judge *de facto*, and that the writ of prohibition should issue.

PROHIBITION.—WHEN THE WRIT WILL LIE: See generally note to *State v. Commissioners of Roads*, 12 Am. Dec. 604-609. It will not lie to restrain a governor from issuing a commission to an officer because of irregularity in his election: *Greir v. Taylor*, 4 McCord, 206; 17 Am. Dec. 731. It will not be issued to inferior tribunals except to restrain them from exceeding their jurisdiction, or exercising a jurisdiction which they do not possess: *People v. Wayne Circuit Court*, 11 Mich. 393; 83 Am. Dec. 754; *Grigg v. Dalehomer*, 86 Va. 508; *McInerney v. Denver*, 17 Col. 302; *State v. Judge*, 44 La. Ann. 1093; *State v. Field*, 112 Mo. 554; and will be denied if there is any other adequate remedy: *Ex parte Braudlacht*, 2 Hill, 367; 33 Am. Dec. 593; *Fresno Nat. Bank v. Superior Court*, 83 Cal. 491; *Agassiz v. Superior Court*, 90 Cal. 101; *State v. Bightor*, 44 La. Ann. 298.

OFFICERS DE FACTO, WHO ARE: See generally notes to *Hildreth v. McIntire*, 19 Am. Dec. 63-69; *Smith v. Bondurant*, 58 Am. Rep. 443; *Hamlin v. Kassafer*, 15 Or. 456; 3 Am. St. Rep. 176; *Waterman v. Chicago etc. R. R. Co.*, 139 Ill. 658; 32 Am. St. Rep. 228. The rule that prohibits the official acts of an officer *de facto* from being called in question presupposes the existence of an office *de jure*: *Gorman v. People*, 17 Col. 596; 31 Am. St. Rep. 350; but the acts of a *de facto* officer, done in compliance with a statute afterwards declared unconstitutional, are not illegal: *King v. Philadelphia Co.*, 154 Pa. St. 160; 35 Am. St. Rep. 817.

OFFICERS, TITLE TO, NOT TRIABLE COLLATERALLY: *Hamlin v. Kassafer*, 15 Or. 456; 3 Am. St. Rep. 176; *Jewell v. Gilbert*, 64 N. H. 13; 10 Am. St. Rep. 357; *Hallgren v. Campbell*, 82 Mich. 255; 21 Am. St. Rep. 557; *Wiseen v. Kimmel*, 109 Mo. 260; *Tower v. Welker*, 93 Mich. 332.

GAGE v. PHILLIPS.

[21 NEVADA, 150.]

CONTRACT REDUCED TO WRITING, PAROL EVIDENCE INADMISSIBLE TO VARY TERMS OF.—A contract which has been reduced to writing, and is not alleged to be tainted with fraud or executed by mistake, cannot be varied by parol evidence of the contents of lost letters which passed between the parties before it was executed.

CONTRACT IN WRITING, IGNORANCE OF CONTENTS, HOW FAR A DEFENSE TO ACTION ON.—One who subscribes a written instrument cannot escape his liability thereunder, upon the ground that he did not know what he was signing, unless he proves that his signature was obtained by fraudulent misrepresentations as to its contents, or shows, as an excuse for his want of care, that a relationship of trust and confidence existed between him and the other party.

WITNESSES—ACTIONS BY OR AGAINST REPRESENTATIVES OF DECEASED PERSONS.—Under the Nevada act of 1881, which provides that "no

person shall be allowed to testify . . . when the opposite party to the transaction is dead, or the person, for whose immediate benefit the action or proceeding is prosecuted or defended, is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person," the defendant in a suit by the surviving member of a partnership to foreclose a chattel mortgage cannot be permitted to testify as to a conversation with a deceased member of that partnership, in which he agreed to take certain property in satisfaction of the mortgage.

BILL to foreclose a chattel mortgage.

Trenmor Coffin and William Woodburn, for the appellant.

W. E. F. Deal, for the respondent.

151 MURPHY, J. This action was brought by W. S. Gage, as surviving partner of the firm composed of Clark P. Hubbell, J. C. Hampton, and W. S. Gage, doing business under the firm name of J. C. Hampton & Co., to foreclose a mortgage executed by M. A. Phillips, the defendant, to J. C. Hampton & Co., of Virginia City, Nevada, dated on the sixteenth day of May, 1887. The complaint contains the usual allegations in actions of the kind.

In her answer the defendant avers: "That on or about the — day of May, 1888, said defendant was the owner of a certain lot of furniture, carpets, bedding, stoves, and all necessary articles for the complete furnishing of a lodging-house, which was then in a lodging-house situated on B street, in Virginia City, Nevada, . . . and which said lot and lodging-house ¹⁵² were then owned by said J. C. Hampton, now deceased, or by said firm of J. C. Hampton & Co. That on or about said — day of May, 1888, this defendant and said J. C. Hampton, now deceased, agreed together that said J. C. Hampton should take said furniture, bedding, carpets, stoves, and other articles then in said lodging-house, in full satisfaction of the note and mortgage mentioned in plaintiff's complaint. That said J. C. Hampton, now deceased, then, either for himself or for said J. C. Hampton & Co., did take said furniture and property in full satisfaction of said note and mortgage. That said J. C. Hampton died without satisfying said mortgage, or the record thereof. That said furniture and other property was of the reasonable worth and value of three thousand dollars." The plaintiff introduced his note and mortgage in evidence, and rested his case in chief.

It appears from the transcript that in the year 1881 the de-

fendant borrowed a large sum of money from J. C. Hampton & Co., giving as security for the payment thereof notes secured by mortgages on property situated in Virginia City and Carson City, Nevada. That the furniture now in controversy was in a house in Virginia City, and has never been removed therefrom. That on the sixteenth day of May, 1887, J. C. Hampton, for the firm of J. C. Hampton & Co., had a settlement of accounts with the defendant, and it appears that on such settlement defendant owed the firm of J. C. Hampton & Co. about twelve thousand dollars. The defendant gave to J. C. Hampton a deed to the Virginia City property; consideration, one thousand dollars. She also executed and delivered to J. C. Hampton & Co., at the same time and place, and as a part of the same transaction, the note and mortgage sued upon, and a bill of sale of all the furniture in the Virginia City house. The defendant now swears, that, at the time she signed the bill of sale, she did not know what she was signing, as she had no glasses with her, and, as she had borrowed one hundred and fifty dollars from Hampton on the day she signed the papers, she supposed she was signing a note for that amount.

The defendant also testified, or attempted to, that she had a conversation and some correspondence with J. C. Hampton, in which he agreed to take the furniture in payment of the two thousand dollars indebtedness, and enter satisfaction of the mortgage sued upon.

¹⁵⁸ The letters claimed to have been received from Hampton could not be found, and the defendant called a Mrs. C. H. Robinson as a witness, and offered to prove by her the contents of the letters written by her for Mrs. Phillips to Hampton, and Hampton's letters in reply, which it appears that Mrs. Robinson had read to the defendant; to all of which counsel for the plaintiff objected, on the ground and for the reason that all the correspondence was had before the note and mortgage were given. The court sustained the objection, and the defendant excepted to the ruling.

The testimony was inadmissible for the purpose offered. When parties reduce their contract to writing, all oral negotiations and agreements are merged in the writing, and the instrument must be treated as containing the whole contract, and parol proof is not admissible to alter its terms, or to show that instead of being absolute, as it purports to be, it was in

reality conditional, unless the party attacking the instrument can establish fraud or mistake in its execution.

The case of *Stewart v. Babbs*, 120 Ind. 571, is directly in point on this case. In that case the defendants purchased land. They gave notes and mortgages to secure the payment of the purchase money. On the trial of the case the defendants gave testimony changing the terms of the deed and mortgage. On appeal, the supreme court said: "It is well settled by a long line of decisions of this court, that when the parties reduce their contract to writing, all oral negotiations and stipulations are merged therein": See, also, *Wight v. Shelby R. R. Co.*, 16 B. Mon. 4; 63 Am. Dec. 522; *Fairbanks v. Metcalf*, 8 Mass. 238; *Ward v. Lewis*, 4 Pick. 520; *Worrall v. Munn*, 5 N. Y. 238; 55 Am. Dec. 330; *Clark v. Gifford*, 10 Wend. 313; *Gilbert v. North American Fire Ins. Co.*, 23 Wend. 45; 35 Am. Dec. 543; *De Witt v. Berry*, 134 U. S. 306; *Polhill v. Brown*, 84 Ga. 338; *Lakeside Land Co. v. Dromgoole*, 89 Ala. 505; *Bruns v. Schreiber*, 43 Minn. 468; *Northwestern Fuel Co. v. Bruns*, 1 N. Dak. 137; *Hills v. Rix*, 43 Minn. 543.

There is neither fraud nor mistake charged in the answer, and the attorney for the defendant stated in open court "that they did not claim that there was any fraud in the transactions." The mere statement of the defendant, "that she did not know what she was signing when she signed the bill of sale," is no excuse in law. In order to be of any benefit to her, she should have set out in her answer that the paper introduced in evidence ¹⁵⁴ was obtained by misrepresentations of its contents, and that the misrepresentations were false, and that she had exercised due diligence to guard against fraud; and, to excuse a want of due care and diligence in a case of this kind, the defendant should show that there was a known trust and confidence between the parties to the instrument, and that the relationship of the parties was such as to justify the existence of such trust and confidence.

Defendant attempted to prove that in the spring of 1888, and prior to the death of Hampton, she had a conversation with him, wherein he agreed to take the furniture in full payment of the amount due on the note and mortgage, to wit, two thousand dollars, and enter satisfaction of the same. To the introduction of this testimony plaintiff objected to the defendant testifying to any conversation had between herself and Hampton in relation to their business transaction, for the reason that the other party to the transaction was dead. The

defendant admitted that all her dealings and conversations were with J. C. Hampton

The court sustained the objection, and this defendant claims to be error, and in support thereof rely upon the authority of the cases of *Crane v. Gloster*, 13 Nev. 279; and *Vesey v. Benton*, 13 Nev. 284.

In the statute of 1864, page 77, we had an act of the legislature defining who should and who should not be witnesses. Under that statute the decision in the case of *Roney v. Buckland*, 4 Nev. 45, was rendered, in which this court held: "When a surviving partner is sued for a loan for the use of the firm, made to the deceased partner, and of the particulars of which the deceased partner only was cognizant, the plaintiff is not a competent witness in his own behalf." In 1869, at the time of the adoption of our civil practice act (either by mistake or design), the following paragraph was omitted from the act: "Except where the adverse party is dead, or where the opposite party shall be the administrator or executor." Under the act of 1869 the cases in 13 Nevada were decided, and each of these opinions were written by the judges under protest, and they did not hesitate to express their contempt of an act that required of them to affirm judgments, when such judgments had been obtained on the testimony of parties to a transaction, when the opposite parties, and the only persons who could testify or contradict their statements were dead.

¹⁵⁵ In the case of *Crane v. Gloster*, 13 Nev. 281, Justice Beatty said: "It appears, then, that the old law recognized two reasons for excluding the testimony of a party interested, while the present law recognizes but one. Of the two principles of exclusion, the sounder and better has been rejected, and the more arbitrary and unreasonable retained. The result is, that our law on this subject is about as bad as it could be made. The policy of sealing the lips of the surviving party to any transaction, when the opposite party, whether principal or agent, is dead, is sanctioned and approved by the statutes of several of the states. . . . We, however, have retained this rule in its most arbitrary form, and have abolished altogether the other rule, which invariably operated to the promotion of justice." Hawley, C. J., in *Vesey v. Benton*, 13 Nev. 284, said: "It seems proper, however, in view of the results reached in *Crane v. Gloster*, 13 Nev. 279, and in this case, to call the attention of the legislature to the crude and

unsatisfactory provisions of the statute referred to. The only object of incorporating any provision of exclusion is to prevent fraud and injustice." Then, after commenting upon the facts in the two cases mentioned and the application of the statute, he says: "Thus, as will readily be seen, giving to the defendant in the former, and the plaintiff in the latter, case, an undue and unfair advantage. A statute that leads to such results is repugnant to every sense of justice and of right, and ought to be amended." It was amended by an act of the legislature of 1881 (Stats. 1881, p. 80), and reads as follows: "No person shall be allowed to testify . . . when the other party to the transaction is dead, or when the opposite party to the action, or the person for whose immediate benefit the action or proceeding is prosecuted or defended, is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person." Under the above statute, the defendant was not a competent witness to prove the conversation had between himself and Hampton.

She is prohibited from testifying as to any statement made by the deceased to her, or to any business transaction between herself and the deceased. The statute has in view transactions between parties, one of whom had since died, and whose representative was engaged in a suit with the survivor. As to such transaction neither party is allowed to testify. The survivor should not, ¹⁵⁶ because the mouth of the other party to the transaction is forever closed. Therefore the rule as laid down in the case of *Roney v. Buckland*, 4 Nev. 55, is a clear exposition of the law as it then existed, and re-enacted in 1881, while the cases in 13 Nevada were a correct interpretation of the law at the time the decisions were rendered. The act of the legislature governing the cases being repealed, they are no longer authorities in actions such as the one under consideration. In support of the views herein expressed, we cite as authorities: *Wilcox v. Corwin*, 117 N. Y. 502; *Clift v. Moses*, 112 N. Y. 481; *Tuck v. Nelson*, 62 N. H. 471; *Parks v. Andrews*, 56 Hun, 393; *Kimble v. Carothers*, 81 Pa. St. 506; *Koshler v. Adler*, 91 N. Y. 657; *Shain v. Forbes*, 82 Cal. 583; *Parks v. Caudle*, 58 Tex. 221; *Dolan v. Dolan*, 89 Ala. 256; *Glover v. Thomas*, 75 Tex. 506; *Fulcher v. Mandell*, 83 Ga. 715; *Nesbitt v. Parrott*, 84 Ga. 142; *Patterson v. Martin*, 33 W. Va. 494; *Gunther v. Bennett*, 72 Md. 384; *Gavin v. Bischoff*, 80 Iowa, 605.

In the case of *Simpson v. Simpson*, 107 N. C. 552, plaintiff was permitted to testify that the sum of fifty dollars had been paid on the note and mortgage. The mortgagor and maker of the note was dead. The supreme court held "that the plaintiff was not a competent witness to prove what was, or was not paid; the proof necessarily concerned transactions with the deceased about which he could testify, and might testify, differently, if living, and we think he was rendered incompetent as a witness for any such purpose." Counsel for appellant, in their oral argument, in this court claimed, that, the action being prosecuted by Gage as surviving partner, the rule did not apply, and the defendant should have been permitted to testify. The act of the legislature under consideration in this case accomplishes the very purpose of its enactment, namely, it prevents living witnesses from establishing contracts, by their own evidence, as to personal transactions and communications with parties whose lips have been sealed by death.

The case of *Green v. Edick*, 56 N. Y. 613, was an action against the defendant, as surviving partner of the firm of Edick and Son. Upon the trial, plaintiff, as a witness in his own behalf, was allowed to testify to a conversation between himself and the deceased partner. Held to be error, and judgment reversed: *Roney v. Buckland*, 4 Nev. 45; *Shain v. Forbes*, 82 Cal. 583; *Dolan v. Dolan*, 89 Ala. 256.

¹⁵⁷ There was no error in the ruling of the court in refusing the defendant permission to amend her answer: 1. The amendment was intended to vary the terms of a written contract, which was not permissible, in the face of the admission of the defendant that she did not claim there was any fraud in the transaction; and 2. The court stated that, if the defendant wanted to show that the bill of sale was intended as a mortgage, she could do so. There was no error in the court's refusal to make the finding asked for by the defendant. There is nothing in the case that would justify the making of any such finding. It therefore follows, from the views we have expressed, and from the authorities we have cited, that there was no error committed by the court in its rulings, and the claim of the appellant that there is no evidence to sustain a decree of the court is not well founded.

The judgment of the district court and the order refusing a new trial are affirmed.

MISTAKE.—IGNORANCE OF CONTENTS OF INSTRUMENT, WHEN NOT A GROUND FOR RELIEF: See generally note to *Spilne v. Baltimore etc. R. R. Co.*, 22 Am. St. Rep. 384-388.

CONTRACTS.—PRIOR VERBAL AGREEMENTS PRESUMED TO BE MERGED IN WRITTEN CONTRACT: *Sparks v. Baltzell*, 1 Fla. 301; 46 Am. Dec. 346; *Rockmore v. Davenport*, 14 Tex. 602; 65 Am. Dec. 132; *Downie v. White*, 12 Wis. 176; 78 Am. Dec. 731; *Reed v. Van Ostrand*, 1 Wend. 424; 19 Am. Dec. 529; *Thompson v. Sloan*, 23 Wend. 71; 35 Am. Dec. 546; *Stoddard v. Nelson*, 17 Or. 417.

WITNESSES.—TRANSACTION OR COMMUNICATION BETWEEN DECEASED PARTNER AND TRUSTEE cannot be proved by means of the trustee in an action by the beneficiaries of a trust fund against the surviving members of the firm: *Morgan v. Johnson*, 87 Ga. 382. Similarly evidence of a transaction with an agent is inadmissible in an action on a contract against the principal, after such agent is dead: *Trunkay v. Hedstrom*, 181 Ill. 204; *Parish v. Wood Sewing Mach. Co.*, 79 Ga. 682.

BOWLER v. CURLER.

[21 NEVADA, 158.]

TRUSTS, CONSTRUCTIVE TRUST, PAROL EVIDENCE TO ESTABLISH.—A conveyance of land made because of the confidential relations between the grantor and the grantee, and without any other consideration than that the grantee shall hold such land in trust for the benefit of the grantor, or, in case of the grantor's death, for the benefit of his daughter, raises a constructive trust which may be established by parol evidence, although the statute of frauds provides that no trusts concerning lands shall be created "unless by act or operation of law, or by deed or conveyance in writing," subscribed by the trustor.

BILL to establish a trust.

Robert M. Clark, for the appellants.

A. W. Crocker, Trenmor Coffin, P. Reddy, and P. M. Bowler, Jr., in *proprie personæ*, for the respondent.

¹⁵⁹ **BELKNAP, C. J.** The plaintiff conveyed certain real property described in the complaint to his father-in-law, the appellant. The deed of conveyance ¹⁶¹ states that it was made in consideration of the sum of one thousand two hundred dollars. Plaintiff claimed, and the court and jury found, in substance, that the title to the property was conveyed to the appellant, without consideration, upon his promise to hold it in trust for the benefit of the plaintiff, and, in case of the plaintiff's death, for the benefit of his infant daughter; and that the conveyance was made because of the confidential and influential relation which existed between the parties. A de-

deed was entered in favor of the plaintiff, requiring the defendant's son, who was also a defendant in the case, and who received the title to the property without consideration, to make a deed of conveyance thereof to the plaintiff.

Appellant claims that parol evidence was inadmissible to prove the trust. The claim is based upon the statute of frauds. The statute provides: "No estate or interest in lands . . . nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same": Gen. Stats., sec. 2624.

If the statute is applicable to the case, the trust is void, because it is an express trust, established by parol evidence only. Nor is the trust one arising by act or operation of law within the meaning of the statute, for the law never implies a trust when there is an express one declared by word or writing: 2 Washburn on Real Property, 470; *Dennison v. Goehring*, 7 Pa. St. 175; 47 Am. Dec. 505. But the statute of frauds has no application.

The plaintiff conveyed the property to the defendant because of the confidence reposed in him, without consideration other than he should hold it subject to the trust mentioned. If defendant were permitted to retain it, plaintiff could be defrauded, and the statute, which was intended to prevent frauds, would be the means for the accomplishment of a fraud. To prevent such a result, equity raises a constructive trust in the grantee and in favor of the grantor.

In the case of *Cox v. Arnsmann*, 76 Ind. 212, a husband and wife conveyed land to a person without other consideration than that he should immediately reconvey it to the wife. It was held that the land was taken in trust for the wife. The court said: "The trust in the present case, being an express trust ¹⁶² in relation to land, cannot be proved by parol, without violating the statute, unless there is some equitable rule of construction which takes such a case out of the statute. There are in equity certain trusts called 'constructive trusts,' which do not arise by implication of law. They are not resulting trusts, but are said to be in the nature of resulting trusts: Perry on Trusts, secs. 240, 241. Thus, equity will raise a constructive trust to prevent a fraud: 2 Washburn on Real Property, 476. And whenever property is acquired by

fraud, or when, though originally acquired without fraud, it is against equity that it should be retained by the party, then equity raises a constructive trust, which is held to be not within the statute (2 Washburn on Real Property, sec. 482), and which may be proved by parol. Thus, in the case of *Hayden v. Denslow*, 27 Conn. 385, there was an agreement between father and son, by which the son was to convey land to the father, and the latter was to hold it in trust for the son's wife. It was held that when a deed is given and received for such a purpose a constructive trust arises, which will be enforced in equity, and that the facts out of which such trust arises may be proved by parol. So in the case of *Hoge v. Hoge*, 1 Watts, 163, 26 Am. Dec. 52, it was held that if a testator be induced to make a devise, by the promise of the devisee that it should be applied for the benefit of another, equity, upon these facts, would create a constructive trust, which might be established by parol."

Another case similar in principle is that of *Wood v. Rabe*, 96 N. Y. 422, 48 Am. Rep. 640. In that case, as in this, the trust was oral. The court said: "But, being oral, the trust was void within the sixth section of the statute, unless the transaction constituted a trust by implication or operation of law, and was therefore within the exception in the seventh section. It is not easy to ascertain from the adjudged cases the exact scope of the exception in the statute, Car. 11, of trusts arising by 'implication or construction of law,' or of the equivalent exception in our statute of trusts arising by 'implication or operation of law.' It is not difficult to name trusts which unequivocally are trusts arising by implication or operation of law. Trusts arising from the presumed intention of the parties, indicated by their acts, although not expressly declared, and those arising from the application of some settled principle of equity to the situation, furnish many instances of implied or constructive trusts. Resulting trusts at common law arising from the payment of purchase ¹⁶³ money, or when the trust is not declared, or is declared only in part, or for any reason fails, are illustrations of the former class, and those arising by equitable construction, independently of intention, from dealings by trustees or quasi trustees with trust property, furnish many examples of the latter.

But there is a large class of so-called 'constructive trusts' or trusts *ex maleficio*, where courts of equity treat the holder

of the legal title to land as a trustee, and, through the medium of an assumed trust, make that title subservient to the circumvention of fraud and the attainments of justice. Trusts of this character are not, I assume, within the exception in the statute. . . . But see *Davies v. Otty*, 35 Beav. 208; *Sechrist's Appeal*, 66 Pa. St. 237. So, where a trust is sought to be established from the violation of an oral agreement purporting to create a trust, and a court of equity upholds the trust, and enforces specific performance, the trust is not an implied or constructive trust within the statute: See *Bellarie v. Compton*, 2 Vern. 294. The court in granting relief in case of an oral agreement proceeds upon the ground of fraud, actual or constructive, and enforces the agreement notwithstanding the statute, by reason of the special circumstances."

The two principles upon which equity proceeds in this character of case are thus stated: "One is that it will not permit the statute of frauds to be used as an instrument of fraud; and the other that when a person, through the influence of a confidential relation, acquires title to property, or obtain an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief": Page 425.

Some of the decided cases hold that trusts arising out of facts similar to those of the present case arise by implication or construction of law, and are, therefore, within the exception in the statute of frauds; others, that such cases do not fall within the exception; but all agree that either by the exception, or not notwithstanding the statute of frauds, relief may be granted in a proper case. Appellant also claims that if any trust was established it was for the benefit of plaintiff's daughter, and not for himself. The complaint alleges a trust in favor of the daughter; and also a trust for the benefit of plaintiff, and, in the event of his death, then for the benefit of his daughter. The pleading is ambiguous in this respect, but the objection was ¹⁶⁴ not taken, and the evidence was sufficient to support the finding of fact upon this point. The judgment and order are affirmed.

TRUSTS IN REAL PROPERTY.—PAROL EVIDENCE, WHEN ADMISSIBLE TO ESTABLISH: See generally note to *Jackson v. Cleveland*, 90 Am. Dec. 270-277. Constructive trusts in real property may be established by parol: *Brisson v. Brisson*, 75 Cal. 525; 7 Am. St. Rep. 189; *Larmon v. Knight*, 140 Ill. 232; 33 Am. St. Rep. 229.

STATE v. LUNG.

[21 NEVADA, 200.]

RAPE, CRIME OF, WHEN COMPLETE WITHOUT ACTUAL FORCE.—To constitute rape, where there is no actual force used, the woman must have been unconscious, or unable to comprehend fairly the nature and consequence of the sexual act.

RAPE, ATTEMPT TO COMMIT—NECESSARY ELEMENTS OF CRIME.—To render a man guilty of the crime of an attempt to commit rape, it is not enough that he intended to use the force necessary to accomplish his purpose, notwithstanding the woman's resistance, or in the case of constructive force, either to destroy her power to resist him by the administration of liquors or drugs, or to take advantage of the fact that she was already in a condition in which either the mental or physical ability to resist is wanting; he must, in addition to this, have done some act which, in connection with this intent, constitutes the attempt.

CRIMINAL LAW—ATTEMPT TO COMMIT CRIME, AND PREPARATION FOR ATTEMPT DISTINGUISHED.—Preparation for an attempt to commit a crime consists in devising the means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission, after the preparations are made.

PLEADING.—AN ARGUMENTATIVE OR INDIRECT STATEMENT OF A FACT is not permissible in an indictment. Hence there is no sufficient averment of an intent to commit a crime where it is merely alleged that the defendant did the specific act charged in an attempt to commit that crime.

RAPE, ATTEMPT TO COMMIT—ADMINISTRATION OF CANTHARIDES.—Sexual intercourse procured by administering cantharides to a woman does not amount to rape, where no actual force is used. Hence proof of an attempt to administer that drug, no offer or endeavor to have connection with the woman, by force or otherwise, being in evidence, will not support an indictment for an attempt to commit rape.

PROSECUTION for an attempt to commit rape.

M. S. Bonnißfeld, for the appellant.

James D. Torreyson, attorney general, and *E. L. Williams*, district attorney of Humboldt County, for the respondent.

312 BIGELOW, J. The defendant is charged with an attempt to commit rape. Rape is defined by our statute to be the carnal knowledge of a woman forcibly and against her will. Force is a necessary ingredient in the commission of the offense, except where committed upon a child under the age of consent: *State v. Pickett*, 11 Nev. 255; 21 Am. Rep. 754. The only qualification to this rule is that the force may be constructive: *Lewis v. State*, 30 Ala. 54; 68 Am. Dec. 113. This constructive force has been held to exist where the defendant had violated the woman's person after she became insensible from intoxicating liquors given her by him, for the purpose

of exciting her and then having sexual connection with her: *Queen v. Camplin*, 1 Cox C. C. 220; 1 Car. & K. 746; 1 Den. C. C. 89; where the woman was so drunk as to be insensible, although the liquor was not given her by the defendant: *Commonwealth v. Burke*, 105 Mass. 376; 7 Am. Rep. 531; where she was in such deep slumber as to be unconscious of the act: *Regina v. Mayers*, 12 Cox C. C. 311; and where her powers of resistance had been overcome by the administration of ether or chloroform: 2 Wharton and Stillé on Medical Jurisprudence, 3d ed., secs. 245, 267. In *McQuirk v. State*, 84 Ala. 435, 5 Am. St. Rep. 381, it is said: "It is true that the element of force need not be actual, but may be constructive or implied. If the woman is mentally unconscious from drink or sleep, or from other cause is in a state of stupefaction, so that the act of the unlawful carnal knowledge on the part of the man was committed without her conscious and voluntary permission, the idea of force is necessarily involved in the wrongful act itself—the act of penetration. But even in cases of this kind the intent to use force, if necessary to accomplish the offense, is essential to criminality."

²¹³ Whether intercourse with a nonresisting or consenting idiotic or insane woman is rape depends upon her capacity to understand the nature of the act: *People v. Crosswell*, 18 Mich. 433; 87 Am. Dec. 774; or, as stated in *Regina v. Barrett*, 12 Cox C. C. 498, upon the possession by her of a will-power with which to either consent or refuse. Fraud, as by personating the woman's husband: *Rex v. Jackson*, Russ & R. C. C. 487; *State v. Brooks*, 76 N. C. 1, or where she consents to the act under the belief, fraudulently induced by the defendant, that it is necessary medical treatment: *Don Moran v. People*, 25 Mich. 356, 12 Am. Rep. 283, does not supply the want of force. The sum of the cases seems to be that to constitute rape, where there is no force used, the woman must have been unconscious, or unable to fairly comprehend the nature and consequence of the sexual act. It must necessarily go this far, or else there is no distinction between rape, where the force used is constructive, and seduction. Anything which merely excites the woman's passions, leaving her at the same time in the full possession of her mental and physical powers, capable of comprehending the nature of the act and of exercising her own volition in the matter is classed rather among the arts of the seducer than the weapons of him who would destroy female virtue by force.

In *Queen v. Camplin*, 1 Cox C. C. 220, the prisoner had given the woman intoxicating liquors for the purpose of exciting her, and thereby inducing her to consent to his advances. Failing in this, she finally became insensible, and he then violated her person. This was held to be rape, but only because he had taken advantage of her unconscious condition. A careful study of the case shows that had he succeeded in inducing her to consent, although the consent was obtained through the liquors given her, it would not have been so held. In *People v. Royal*, 53 Cal. 62, the defendant had practiced manipulations upon a girl of sixteen until she was, as she testified, so dull and stupid as to be unconscious of the nature of the act of sexual intercourse. This was held not to be rape.

As an attempt to commit a crime can only be made under circumstances which, had the attempt succeeded, would have constituted the entire substantive offense (1 Bishop's Criminal Law, sec. 781, 736; *State v. Brooks*, 76 N. C. 1), the result which we gather from these principles is, that for a man to be guilty of the crime of an attempt to commit rape, he must have ²¹⁴intended to use the force necessary to accomplish his purpose, notwithstanding the woman's resistance, or in the case of constructive force, to either destroy her power to resist him by the administration of liquors or drugs, or to take advantage of the fact that she was already in the condition in which either the mental or physical ability to resist is wanting.

In addition to this, there must have been some act done which, in connection with this intent, constitutes the attempt. There is a distinction, sometimes difficult to draw, between this act and mere acts of preparation, or acts which are not so closely connected with the substantive crime intended as to constitute an attempt: 1 Wharton on Criminal Law, sec. 180. For instance, in *People v. Murray*, 14 Cal. 159, it was held that declarations of an intent to enter into an incestuous marriage, followed by elopement for the purpose, and sending for a magistrate to solemnize the ceremony, were mere acts of preparation, and did not constitute an attempt to commit the crime. The court says: "Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission, after the preparations are made." In *United States v. Stephens*,

8 Saw. 116, the defendant had attempted to purchase liquors in San Francisco for the purpose of introducing them into Alaska. This was held mere preparation, and not an attempt to introduce them into Alaska. In *State v. Colvin*, 90 N. C. 717, it is said: "It is essential that the defendant should have done some acts intended, adapted, approximating, and, in the ordinary and likely course of things, would result in the commission of the particular crime; and this must be averred in the indictment, and proved." In *Kelly v. Commonwealth*, 1 Grant Cas. 484, the defendant had been convicted of murder, charged to have been perpetrated in an attempt to commit rape. The defendant and others had unlawfully entered a house, in the night-time, in which a woman of loose character lived, and in a fight which ensued the father of the woman was killed. In reversing the conviction the court held that entering a house with intent to commit a rape therein did not constitute an attempt to do so; that the attempt at rape had not yet been made. It is there said: "The court should have instructed the jury that acts are necessary to constitute an attempt, and that an attempt to commit ²¹⁵ a rape is an ineffectual offer, by force, with intent to have carnal connection." The overt act which constitutes an attempt must be one which manifests an intention to commit the crime: *Cunningham v. State*, 49 Miss. 685. A man's intentions must be judged by his acts. In attempts his act must have been one which, under all the circumstances, manifests an intention to commit that particular offense: 1 Wharton on Criminal Law, sec. 176. It is essential, too, that the act of endeavor should be intrinsically adapted to effect the purpose, and that the court and the accused may see that it is so adapted, it should be specifically stated in the indictment: *State v. Wilson*, 80 Conn. 504.

The specific act charged against the defendant in the indictment in the case at bar is that of mixing cantharides in some coffee which he knew a certain woman was about to drink. There is no direct allegation that this was done with intent to commit rape. It is argued, however, that as it is alleged that it was done in an attempt to commit rape, and an attempt necessarily includes an intent to commit the crime, it follows that the intent is sufficiently stated. At the best, this is merely an argumentative statement of the fact, which is not permissible in an indictment: *People v. Logan*, 1 Nev. 110. Whether certain facts constitute an attempt to

commit crime is not only a question of law, but one that is often intricate and difficult of solution. These facts must be stated in the indictment, so that the court may determine whether or not they constitute an offense. In *State v. Wilson*, 30 Conn. 504, in construing a similar indictment, the court uses this language: "If it be said that the words 'attempt to steal' imply it [the intent] sufficiently, the conclusive answer is that they equally imply an overt act of endeavor, for that is equally an element of an attempt; and if either element of the offense may be left to implication, both may be, and a general averment of an attempt to steal or to rob, or other attempt, would in such cases be sufficient."

In *Randolph v. Commonwealth*, 6 Serg. & R. 397, it is said: "This mode of charging a thing by way of argument, and not directly, will not do. To say that a man made an attempt is very uncertain language. We cannot pretend to say what it is that the defendant is charged with doing; and, without knowing that, we cannot determine whether what he did was an indictable offense." For like rulings upon indictments for an assault ²¹⁶ with intent to commit crime see *State v. Ross*, 25 Mo. 426; *State v. Martin*, 3 Dev. 329; *State v. Marshall*, 14 Ala. 411.

The indictment is also insufficient in that it does not appear that the act was adequate, approximate, and sufficient to constitute the offense of which he was convicted.

Cantharides, or Spanish fly, is classed with the irritant poisons, such as arsenic, the acids, corrosive sublimate, etc., and is capable of producing fatal results. The first symptoms are nausea, vertigo, and a burning sensation in the mouth and throat, followed sometimes by irritation in the genital organs. There is nothing about it in the nature of a narcotic or an anæsthetic: 2 Wharton and Stillé on Medical Jurisprudence, secs. 523, 524; Taylor on Poisons, 576. Except as an effect of the sickness produced, it leaves a person in the full possession of his faculties. It can produce no such condition of mind or body as we have seen is necessary to constitute the constructive force in rape. While the act was dastardly, and well deserves punishment, it cannot, as an attempt to commit rape, be distinguished, in principle, from that of giving the liquor in *Queen v. Camplin*, 1 Cox C. C. 220, or the manipulation in *People v. Royal*, 53 Cal. 62. It was not adequate to bring about that state of affairs which, had he succeeded in having carnal intercourse with the woman, would have consti-

tuted rape. There was no offer or attempt to have connection with her, either by force or otherwise, nor is it logically inferable from the act that he then and there intended to violate her person. Possibly he intended to have connection with her subsequently, and believed that the operation of the drug would materially assist him in accomplishing his purpose, by inducing her to consent; but this, if successful, would fall far short of rape. So far the only attempt was to administer the cantharides. The attempt to rape, even if intended, had not yet begun.

Much that has been already said applies also to the evidence, which, in addition to that concerning the attempted administration of the cantharides, which she did not take, is simply that some time before he had said he would have carnal intercourse with her. There is still no logical connection between the act and the ultimate intent sought to be charged. It does not indicate that he then and there intended to carnally know her by force, or was then engaged in attempt to so know her by first destroying her power to resist such an attempt. Whether if there was a drug which, while leaving a woman in the full ²¹⁷ possession of all her other faculties, would create in her an uncontrollable sexual appetite, its administration by one who intended to have intercourse with her, while under its influence, would constitute an attempt to rape, need not be considered. Such a case has never arisen. Probably there is no such drug. At any rate cantharides will not produce such a condition. While, from the knowledge that it will irritate the genital organs, and in ignorance of its dangerous properties, it has frequently been employed for the purpose of exciting the sexual propensities in females, in no case that we have found has it been held, or even suggested, that its administration constituted an attempt at rape. In *Regina v. Hanson*, 2 Car. & K. 912, and *Queen v. Walkden*, 1 Cox C. C. 282, its administration was held to be no offense; in *Regina v. Button*, 8 Car. & P. 660, and *Commonwealth v. Stratton*, 114 Mass. 303, 19 Am. Rep. 350, to be an assault; and in *People v. Carmichael*, 5 Mich. 10, 71 Am. Dec. 769, under a statute against the administration of poison with intent to injure another, to be felony. In the latter case the defense was that the cantharides had been given for the purpose of exciting the woman's passions, so that the defendant could more easily persuade her to have sexual intercourse with him (which would constitute seduction, another statutory offense

in Michigan), and not with intent to injure her. But the court held that as seduction would be one kind of injury, the mere fact that the drug had caused injury different from that intended, was no defense. In California, where the statutory definition of rape has been considerably enlarged, it still only includes cases where resistance is prevented by the administration of intoxicating, narcotic, or anæsthetic substances.

Judgment reversed.

RAPE COMMITTED WHILE THE FEMALE IS UNCONSCIOUS: See cases cited in the note to *Smith v. State*, 80 Am. Dec. 367. That the intent to use force, should fraud or stupefaction fail, is essential to the offense, see cases cited on the same page of that note. In a prosecution for rape, evidence is admissible that the offense was committed by means of an intoxicating or narcotic substance administered to the female by the defendant: *People v. Snyder*, 75 Cal. 323.

RAPE, ATTEMPT TO COMMIT—ELEMENTS OF CRIME.—That the defendant cannot be convicted of an assault with intent to ravish, unless the prosecution establishes not only the existence of the criminal intent, but also some ineffectual act done towards the commission of the crime, see *Glover v. Commonwealth*, 86 Va. 382; *Cunningham v. Commonwealth*, 88 Va. 37. Thus on a trial for rape the accused may be convicted of an assault with intent to ravish, where the evidence shows that he got into bed with the complaining witness and took improper liberties with her while she was asleep, with intent at the time of carnally knowing her, although his purpose was not accomplished, he having made preparations and taken steps towards its accomplishment, with the present means of carrying it into effect: *State v. Dalton*, 106 Mo. 463.

BORDEN v. CLOW.

[21 NEVADA, 375.]

MORTGAGE—ADVERSE POSSESSION BY MORTGAGEE PASSES TITLE, WHEN.

The grantee under a deed, absolute in form but intended as a mortgage, who has held the land conveyed adversely to his grantor for the statutory period, acquires a perfect title thereto. To such a case section 3284 of the Civil Practice Act of Nevada, which provides that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale," has no application.

ADVERSE POSSESSION BY MORTGAGEE—STATUTE OF LIMITATIONS BEGINS TO RUN, WHEN.—Where the grantee under a deed absolute in form, but intended as a mortgage enters into possession of the land conveyed, and holds it under circumstances which show that his possession is adverse to his grantor, the statute of limitations, in the absence of any agreement as to when the indebtedness secured by the deed is to be paid, begins to run immediately from the date of the delivery of the deed.

ADVERSE POSSESSION BY MORTGAGEE—RUNNING OF STATUTE NOT STOPPED BY PAYMENT OF TAXES BY MORTGAGOR, WHEN.—After a mortgage debt is once due, the payment of the taxes by the mortgagor will not stop the running of the statute of limitations in favor of a mortgagee holding possession of the land adversely to the mortgagor.

BILL in equity to redeem a mortgage.

Thomas E. Haydon, and Baker, Wines, and Dorsey, for the appellant.

T. V. Julien and S. D. King, for the respondent.

276 **MURPHY, J.** This was a bill in equity, to have a deed absolute upon its face decreed to be a mortgage, asking for an accounting, and that the plaintiff be permitted to redeem. The facts are substantially that plaintiff, being indebted to the defendant in the sum of seven hundred and fifty dollars, executed to him a deed absolute in form, conveying eighty acres of land situate in Washoe county. This deed was executed by the plaintiff and one O. H. Perry on the twenty-ninth day of March, 1880. After the making of the deed, the plaintiff, holding stock of the Highland Ditch and Water Company, a corporation on which there was an assessment due, borrowed money from the defendant to pay the same, and assigned the stock to the defendant. Some time thereafter, another assessment becoming delinquent, defendant paid it, and the plaintiff surrendered his certificate of stock to the company, and had a certificate issue in the name of the defendant. This change was made, as claimed by the plaintiff, to secure the defendant in the payment of the money **277** advanced on assessments. The defense set up was that both transactions were absolute sales, and not intended as security for money advanced. The cause was tried by the court without a jury, and the court found, as facts: That the giving of the deed and the transfer of the stock were separate transactions; that the stock transaction was a sale or gift, but the giving of the deed was intended as a mortgage, to secure the payment of the sum of seven hundred and fifty dollars; denied the prayer of the plaintiff for an accounting, as well as his right to redeem, for the reason that his right of redemption was barred by the statute of limitation.

Appellant claims that the giving of the deed and the assignment and transfer of the stock was one and the same transaction, and should be considered as such. The court found against him, and the finding is supported by the evidence.

The deed was executed on the twenty-ninth day of March, 1880; the transfer of the stock to the defendant was made on the books of the company on the twenty-fifth day of May, 1883. No conversation was had or agreement entered into at the time of the delivery of the deed as to indicate any further loans by the defendant. Such an interval of time had elapsed after the delivery of the deed and the transfer of the stock that it could not with propriety have been called one transaction; they were two or more agreements, and two separate contracts. The evidence is conflicting, the plaintiff and his stepson testifying as to their understanding of the transaction, which was neither clear nor convincing. The defendant contradicts them in so far as the assignment and transfer of the stock, being intended as security for the money advanced, taken in connection with the fact that stock in the corporation was selling for assessments levied thereon, and the amount of money paid on assessment by the defendant, supports the finding; and under the well-settled rule as to conflict, it must be assumed that the transfer of the stock to the defendant was absolute. The court having found as a fact that the deed given was intended as a mortgage to secure the payment of the sum of seven hundred and fifty dollars, the plaintiff argues that no title could be obtained except by foreclosure and sale; and in support of this view he relies on sections 3270 and 3284 of the Civil Practice Act. Section 3270 provides for the form of action for the foreclosure of mortgages, and has no application to this case whatever. Section 3284 reads as follows: "A mortgage ²⁷⁰ of real property shall not be deemed a conveyance, whatever its term, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale."

It will not be denied that a mortgagee out of possession cannot maintain an action to recover real property from one in possession until such time as he has obtained the right so to do by foreclosure proceedings. But this is not an action of that kind, and from aught that appears in the transcript, the defendant entered into possession of the land in controversy in March 1880, claiming to own the same under his deed, and remained in the quiet and undisturbed possession of the same until the demand for an accounting was made upon him in 1889; that during said time the defendant improved said premises in building houses, fences, clearing the land, and seeding a small portion of it to alfalfa, costing him three

thousand one hundred dollars, and from the testimony given on the hearing, the plaintiff knew of the improvements being made, never objected to the same in any manner, and in fact worked in making said improvements for the defendant, showing conclusively that if the defendant was not holding by virtue of his deed, he was holding adversely to the plaintiff.

Section 3636 of the General Statutes (Civil Procedure) reads: "Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises, under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, . . . and that there has been continued occupation and possession of the premises included in such instrument, . . . or of some part of such premises, under such claim, for five years, the premises so included shall be deemed to have been held adversely."

It is a rule in regard to the statute of limitations, applicable in all cases, that the statute begins to run when the debt is due, and an action can be instituted upon it. There was no agreement between the parties as to when this indebtedness should be paid; therefore the statute began to run immediately upon the delivery of the deed to the defendant. But it is claimed by the plaintiff that, he having paid the taxes on the land for the years 1881, 1882, and 1883, he has a right to have the payments considered as a part of the same transaction, which would in ²⁷⁹ effect bring the case within the provisions of sections 3644 and 3645 of the General Statutes of Nevada. Section 3644 reads: "Actions can only be commenced within six years upon a contract, obligation, or liability, founded upon an instrument in writing." Section 3645: "The time shall be deemed to date from the last transaction, or the last item charged, or the last credit given." A payment made by the mortgagor on the mortgage debt would bring the case within the provisions of section 3645, and the limitation only commences to run from the time of such payment.

We cannot regard the payment of taxes by the plaintiff as the kind of payment contemplated by the statute. Payment on a debt is equivalent to a new promise to pay the debt. Such payment, however, must be directly applied in the reduction of the amount due on the indebtedness. A payment by a debtor upon some outside matter, which the creditor has never recognized or credited upon the indebtedness,

cannot be regarded as a payment on the account. An application of such matter or payment by the debtor, without the assent of the creditor, will not prevent the running of the statute of limitation. A mortgagor cannot manufacture evidence for himself, by making payments upon an indebtedness for which the mortgagee was not bound to pay. It was the duty of the plaintiff to prove that the payment of the taxes was such a payment as entitled him to be credited with the amount on the indebtedness which was the foundation of the transaction. Had the facts been that the mortgagee entered into possession of the premises under an agreement with the mortgagor that he should occupy the same, and that the rents should be applied in the payment of the taxes and extinguishment of the debt, the agreement could readily be enforced; but under the circumstances in this case there has been no mutuality—no meeting of minds of the parties. The mere fact that the plaintiff paid the taxes was not an extinguishment of the indebtedness secured by the deed or mortgage. He could not have gone to the defendant, producing his tax receipt, and demanded that he be given credit upon the mortgage debt. The conveyance being held to be a mortgage, the plaintiff was paying his own debt due the state and county for taxes. He had no claim against the defendant for the amount so paid. Payment within the meaning of the statute must be the actual payment of money, or its equivalent, upon the principle and interest of the debt. Neither can the ²⁸⁰ plaintiff claim any rights by reason of the defendant's paying the taxes on the land, because the defendant claimed to be the owner of the property, and the payment of the taxes by either party would not stay the running of the statute of limitation against the indebtedness.

The payment of the taxes on the land in this case stands in the same light as the payment of taxes on property mortgaged. In such cases it is usual to embody in the mortgage that the mortgagor shall pay the taxes on the land. If he fails to do so, the mortgagee may pay them and has his lien against the property for the amount of money so paid; but the payment of such taxes does not become merged in the original indebtedness; it is but an incident thereof. If paid by the mortgagor, he does so merely to keep his right of redemption good; if paid by the mortgagee, it is to preserve his lien and keep his security from being encumbered by a superior lien. It has also been held that when the instru-

ment itself was silent as to who should pay the taxes, and the party having the equity of redemption fails to pay them, the party holding the paper title may do so; and, upon a proper showing, a court of equity will, in its decree of foreclosure, include the amounts paid on taxes as a lien against the property. But in no event will the payment of the taxes be enforced after the debt is discharged. The amount due for taxes paid expires with the mortgage: *Hitchcock v. Merrick*, 18 Wis. 360. The case of *Hill v. Townley*, 45 Minn. 167, was an action to foreclose a mortgage. The statute of limitation had run against the claim. The plaintiff claimed that, by reason of his having paid the taxes on the property, the action was not barred. The court, in passing upon this question, said: "Taxes paid by the mortgagee upon the mortgaged premises may be collected with it as a part of and in the same manner as the amount secured by the original lien. If the mortgage is barred, the claim for taxes, which is merely incidental, must fall with it. The mortgagee cannot extend the time of limitation by his own act, on paying the taxes, for the protection of the original lien." The plaintiff not having made any payments on the indebtedness due the defendant for more than six years after the same became due the right to redeem was barred by the statute, and the payment of taxes by the defendant could not inure to the benefit of the plaintiff, because the defendant could not recover them from the plaintiff. They were a lien against the property. ²⁸¹ The payment had no connection with the original transaction, and could not prolong the life of the mortgage, and was not such a payment as the defendant could have charged against the plaintiff as part of the original transaction.

The right to foreclose and the right to redeem are reciprocal and commensurable, and if one cannot be enforced, that is regarded as sufficient to preclude a claim for the other. If the right to foreclose is barred by the lapse of time, the right to redeem is barred also: 2 Hilliard on Mortgages, p. 2, sec. 2; 2 Jones on Mortgages, sec. 1141.

The doctrine allowing a conveyance to absorb an interest in land which the conveyance alone did not convey, in order to prevent injury being done to one without fault, is of frequent application; as where a party had executed an absolute deed, to have effect only as a mortgage, and had remained in possession of the land which he conveyed, he was denied the aid of equity to assert his title against an innocent purchaser

from the holder of the legal title, because the proof showed that he was silent when he should have asserted his right of redemption. Therefore he was not in position to ask equity. The plaintiff's equitable interest was divested, not by way of transfer, nor by way of release working upon the estate, but rather by way of estoppel arising from his voluntary act, by having delayed too long, and until his right to legal remedies had been lost by the remediless lapse of time.

The judgment and order appealed from must be affirmed, and it is so ordered.

BIGELOW, J., did not participate in the foregoing decision, having presided at the trial of the case below.

ADVERSE POSSESSION AS BETWEEN MORTGAGOR AND MORTGAGEE.—The statute of limitations does not begin to run in favor of a mortgagee in possession, under an agreement to apply the rents and profits to the satisfaction of the mortgage debt, until the debt is fully discharged from that source: *Anding v. Davis*, 38 Miss. 574; 77 Am. Dec. 658.

ADVERSE POSSESSION.—**PAYMENT OF TAXES BY ONE IN POSSESSION** is always evidence that his holding is adverse: *Wren v. Parker*, 57 Conn. 529; 14 Am. St. Rep. 127; *Frick v. Simon*, 75 Cal. 337; 7 Am. St. Rep. 177.

STATE v. CLARKE.

[21 NEVADA, 333.]

OFFICERS—NOTARIES PUBLIC INELIGIBLE TO HOLD CIVIL OFFICE OF PROFIT, WHEN.—The office of notary public is a "civil office of profit" within the meaning of the provision of the constitution of Nevada, section 2, article 4, which declares that "no person holding any lucrative office under the government of the United States, or any other power, shall be eligible to any civil office of profit under this state."

CONSTITUTIONS—CONSTRUCTION OF.—If the language of a constitution is plain and free from ambiguity, the court is not permitted to speculate further as to what the real intentions of the framers of such constitution may have been.

OFFICES—ELIGIBILITY, MEANING OF.—The word eligibility, when used in regard to the qualifications of candidates for public offices, includes capacity to hold, as well as to be elected, and is no less applicable to appointive than to elective offices.

CONSTITUTIONS, CONSTRUCTION OF EJUSDEM GENERIS.—A section in a constitution requiring the legislature to provide for the election of certain state and city officers "and other necessary officers" is not applicable to officers belonging to classes other than those previously enumerated.

QUO WARRANTO.

Robert M. Clarke, for the appellant.

Sardis Summerfield, in propria persona, for the respondent.

²²⁵ BIGELOW, J. While the appellant was legally exercising the office of notary public in this state, he was appointed receiver of public money in the United States land office at Carson city. The court below held that those two offices were incompatible, under the provisions of section 9 of article 4 of the constitution of Nevada, which reads as follows: "No person holding any lucrative office under the government of the United States, or any other ²²⁶ power, shall be eligible to any civil office of profit under this state; provided, that postmasters whose compensation does not exceed five hundred dollars per annum, or commissioners of deeds, shall not be deemed as holding a lucrative office."

The appellant, however, contends that the office of notary is not a "civil office of profit under this state," within the meaning of this section, and this is the only question presented in the case. The words "office" and "civil office" have several meanings. The sense in which they are used in any particular place can usually be determined by a reference to the context and the subject matter of the instrument. Sometimes they would include the president and trustees of a corporation, executors, deputies, etc., but no such meaning can be attached to them here. They only refer to such officers as are connected with the civil administration of the government, and were doubtless intended to include all such, to the exclusion of military officers. In construing the words "civil officers," as used in the constitution of the United States, Judge Story says: "The sense in which the term is used in the constitution seems to be in contradistinction to military": 1 Story's Constitution, sec. 791. Again, in the next section, he says: "All officers of the United States, therefore, who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the army or navy, are properly civil officers, within the meaning of the constitution."

It has been frequently held that a notary is a public officer: *Kirksey v. Bates*, 7 Port. 529; 31 Am. Dec. 722; *Governor v. Gordon*, 15 Ala. 72; *Smith v. Meador*, 74 Ga. 416; 58 Am. Rep. 488; *Keeney v. Leas*, 14 Iowa, 464. He is also recognized and called an officer in our statutes, is to be appointed

for a definite term, is required to take the official oath, to give a bond the same as other officers, to keep a record of his official acts, and for his services may charge certain fees, which are regulated by law. Clearly he is an officer.

Then is he a civil officer? As there are but two principal divisions of officers—civil and military—known to our system of state government, it must be that all that do not come within one class are included in the other. As a notary is not a military officer, he must be a civil one. By statute, he occupies a position in the civil administration of the government, ³³⁷ and one that is quite important. He is charged with duties to the public at large that constitute him a public or state officer: *State v. Kirk*, 44 Ind. 401; 15 Am. Rep. 239; *Howard v. Shoemaker*, 35 Ind. 111. The opinion of the judges *In re House Bill, No. 166*, 9 Col. 628, is, upon this point, on all fours with the case in hand. It was there held that the office of notary was a civil office within the meaning of that term as used in the constitution, and that consequently a bill authorizing the appointment of one to that position who was not a qualified elector was unconstitutional: See, also, *Mecham on Public Officers*, sec. 1, et seq.; sec. 24; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169. In fact, we do not understand it to be particularly contended that a notary is not a public officer, nor even that he is not a civil officer, but rather, notwithstanding he may be such, that it was not the intention of the makers of the constitution to include that office in the prohibition contained in this section.

This position is based, first, upon the proposition that the office of notary does not come within the mischief intended to be guarded against, and consequently should not be held to be within its terms. In construing a constitution, the same as any other instrument, we are not always to be guided by the letter of the act. We are to seek for the meaning that the words were intended to convey, and endeavor to carry out the intention of those adopting it. But a fundamental principle in all construction is that where the language used is plain and free from ambiguity that must be our guide. We are not permitted to construe that which requires no construction. It is possible that when the convention adopted this section they did not have the office of notary in mind, and that if they had, it would have been excluded; but on the other hand, it is also possible that it would not have been excluded, for there is really as much reason for including this

office as that of many other minor positions, which are admittedly covered by the section. At any rate, it was within the power of the constitution makers, whether sufficient reason did or did not exist for their doing so, to include this office; the language they have used clearly does include it, and, under the circumstances, that is the end of the controversy. We are not permitted to speculate further as to what their real intentions were: *Cooley on Constitutional Limitations*, 69; *Endlich on Interpretation of Statutes*, sec. 6; *Sturges v. Crowninshield*, 4 Wheat. 204; *Gibbons v. Ogden*, 9 Wheat. 217.

§§§ It is also contended that the word "eligible" only refers to elective officers, and consequently does not include those who hold by appointment; but we are of the opinion that it was intended, as used here, to include both. It has been several times decided that the word includes capacity to hold, as well as to be elected to, an office, and if such is the case, no distinction can be drawn between elective and appointive officers. If the incumbent is ineligible to hold an office, it can make no difference whether he obtained it in the first instance by election or appointment. If the constitution read that certain persons shall not hold any civil office of profit, instead of shall not be eligible to such office, it would be clear that this point was untenable, and as it appears that that is what it really means, the same result follows: *State v. Clarke*, 3 Nev. 566, 570; *State v. Murray*, 28 Wis. 96, 99; 9 Am. Rep. 489; *Carson v. McPhetridge*, 15 Ind. 327, 331; *People v. Leonard*, 78 Cal. 230, 233.

As a further reason for the belief that notaries public were not intended to be included in this section of the constitution, it is urged that if so, they must, under section 32 of article 4 of the constitution, which requires the legislature to provide for the election of certain state and county officers, "and other necessary officers," be elected, instead of being appointed; and the case of *State v. Arrington*, 18 Nev. 412, is referred to as sustaining this position. This result might be conceded without militating particularly against the view we have taken, but we do not think it follows that such must be the case. By the amendment of 1889, section 32 was changed so that the words "other necessary officers," no longer appear; but even as it originally stood, they apply only to officers similar to those previously enumerated in the section, and not to legislative officers, officers of the militia, and other officers

belonging to different classes from those mentioned: *Endlich on Interpretation of Statutes*, secs. 405, 409; *Edgcomb v. His Creditors*, 19 Nev. 149, 152.

No error appearing in the judgment, it must be affirmed, and it is so ordered.

OFFICERS.—ELIGIBILITY, MEANING OF: See *Demaree v. Seater*, 50 Kan. 275; 34 Am. St. Rep. 113, and note.

STATUTES, CONSTRUCTION OF.—The intent of the legislature must be ascertained from the statute itself, without reference to the presumed views of the legislators: *Bellville etc. R. R. Co. v. Gregory*, 15 Ill. 20; 53 Am. Dec. 599; *Tynan v. Walker*, 25 Cal. 634; 35 Am. Dec. 152.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

PEOPLE *v.* BOARD OF HEALTH.

[140 NEW YORK, 1.]

BOARDS OF HEALTH ARE NOT REQUIRED TO GIVE NOTICE OF HEARING to any person before they can exercise their jurisdiction for the public welfare, unless the statute under which they are authorized to act expressly requires such notice or hearing.

CONSTITUTIONAL LAW.—BOARDS OF HEALTH CANNOT MAKE ANY FINAL AND CONCLUSIVE DETERMINATION of a nuisance, resulting in the destruction of property or the imposition of penalties, unless the party whose interests are to be affected is entitled, as a matter of right, to a hearing as a condition precedent to the making of such determination.

NUISANCE, POWER TO DECLARE WHAT IS.—A statute giving a board of health power to suppress, abate, and remove any public nuisance detrimental to the public health does not authorize such board to act except when a nuisance really exists, and its determination of such existence cannot be conclusive, though probably it will be attended by a presumption that the board acted legally and correctly.

NUISANCE, LIABILITY OF PERSONS ABATING.—If public authorities, such as municipal boards of health, abate that as a nuisance which is not such in fact they are subject to the same liabilities as an individual guilty of a like wrong.

CERTIORARI.—THE ACTION OF A BOARD OF HEALTH of a municipality taken without giving any person a hearing, and declaring that a nuisance exists, cannot be reviewed by *certiorari*, because the action of such board is not final and conclusive, and may be made without a hearing, and upon its own inspection and knowledge.

CERTIORARI to review the proceedings of the board of health of the city of Yonkers, declaring that certain dams across a river were a nuisance and ordering their removal. The board, before acting, summoned the relator, and he appeared before it in person and by counsel, and evidence on his part and on the part of others was received by the board for the purpose

of ascertaining whether the dams were a nuisance or not. The action of the board was affirmed by the supreme court and also by the general term thereof.

Calvin Frost, for the appellant.

James M. Hunt, for the respondent.

⁵ **EARL, J.** The disposition of this case turns largely upon the effect and the construction of the statutes constituting the board of health, and defining its powers and duties, and we will, therefore, first give attention to the statutes.

By chapter 184 of the Laws of 1881, an act to revise the charter of the city of Yonkers, it is provided in title 9 that the mayor, the supervisor, the president of the common council, the president of the board of water commissioners, the president of the board of police and the health officer shall constitute the board of health of the city, and the board is given power, among other things, "to suppress, abate, and remove any public nuisance detrimental to the public health," and, in addition to other remedies which it may possess by law, it is empowered to issue its warrant whenever necessary to the sheriff of the county of Westchester, or to any policeman of the city, authorizing and commanding him to forthwith suppress, abate, and remove such public nuisance, at the expense of the lot whereon the nuisance exists, and of the owner thereof, to be enforced and collected as in the act provided. It is further provided that, in addition to the powers expressly granted in the act, the board shall "have and exercise all the powers now or at any time hereafter conferred upon boards of health in cities by any general law," and it is authorized to make ordinances, rules, and regulations to carry into effect its powers, and to enforce observance of them by penalties and by action instituted in its name to recover penalties and to restrain and abate the nuisance. By chapter 270 of the Laws of 1885, the general act for the preservation of the public health, it is provided that the board of health in any city of the state, except the cities of New York, Brooklyn, and Buffalo, shall have the power, and it shall be its duty, "to receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances or causes of danger or injury to life and health within the limits of its jurisdiction; to enter upon or within any place or premises where nuisances or conditions dangerous to life and health are known or believed to exist, and by appointed members or persons to "

inspect and examine the same, and all owners, agents, and occupants shall permit such sanitary examinations, and said board of health shall furnish said owners, agents, and occupants a written statement of results or conclusions of such examinations; and every such board of health shall have power, and it shall be its duty, to order the suppression and removal of nuisances and conditions detrimental to life and health found to exist within the limits of its jurisdiction," and "to make, without the publication thereof, such orders and regulations in special and individual cases, not of general application, as it may see fit, concerning the suppression and removal of nuisances." It is further authorized to abate nuisances, and to impose penalties for the violation of its orders and regulations, and the violation of them is also made a misdemeanor, and it may commence actions to restrain and abate nuisances, and to enforce its orders and regulations.

A careful examination of the two acts shows that there is no provision for a hearing before the board on the part of any person who is charged with maintaining a nuisance upon his premises. The right to such a hearing is not expressly given, and cannot be implied from any language found in either act, or from the nature of the subjects dealt with in the acts. Boards of health, and other like boards, act summarily, and it has not been usual anywhere to require them to give a hearing to any person before they can exercise their jurisdiction for the public welfare. The public health might suffer or be imperiled if their action could be delayed until a protracted hearing could be brought to a termination. There is no provision in the acts for calling or swearing witnesses, and there is no general law giving them power to do so. Section 843 of the Code of Civil Procedure is not applicable to such a case, for the reason that the board is not authorized by law to hear testimony or take the oral examination of witnesses.

The question may be asked, how can these provisions conferring powers upon boards of health to interfere with and destroy property, and to impose penalties and create crimes, stand with the constitution securing to every person due process of law before his property or personal rights or liberty can be interfered with? The answer must be that they could not stand if we were obliged to hold that the acts referred to made the determinations of the board of health as to the existence of nuisances final and conclusive upon the owners of the premises whereon they are alleged to exist. Before such

a final and conclusive determination could be made, resulting in the destruction of property, the imposition of penalties and criminal punishments, the party proceeded against must have a hearing, not as matter of favor, but as matter of right, and the right to a hearing must be found in the acts: *Stuart v. Palmer*, 74 N. Y. 183; 30 Am. Rep. 289.

As we have said, there is no provision of law giving any party a right to a judicial hearing before these boards, and there is no provision making their determination final. If the decisions of these boards were final and conclusive, even after a hearing, the citizen would, in many cases, hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated and generally unfitted to discharge grave judicial functions. Boards of health under the acts referred to cannot, as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. They have no jurisdiction to make any order or ordinance abating an alleged nuisance, unless there be in fact a nuisance. It is the actual existence of a nuisance which gives them jurisdiction to act. Their acts declaring nuisances may be presumptively valid until questioned or assailed, for the same reasons which give presumptive legality to the acts of official persons under the maxim *omnia præsumuntur legitime facta donec probetur in contrarium*.

What operation, then, does the order or ordinance of the board of health have under these acts? The nuisance actually existing and the jurisdiction having been regularly exercised, the order or ordinance has all the operation and effect provided in the act, and the persons who abate the nuisance have the protection which they would not have as private persons⁸ abating, not a private nuisance especially injurious to them, but a public nuisance injurious to the general public.

It may be said that if the determination of a board of health as to a nuisance be not final and conclusive, then the members of the board, and all persons acting under their authority in abating the alleged nuisance, act at their peril; and so they do, and no other view of the law would give adequate protection to private rights. They should not destroy property as a nuisance unless they know it to be such; and if there be doubt whether it be a nuisance or not the board should proceed by action to restrain or abate the nuisance.

and thus have the protection of a judgment for what it may do.

It may further be asked, what, under this view of the law, is the remedy of the owner of property threatened with destruction or actually destroyed as a nuisance? He may have his action in equity to restrain the destruction of his property, if the case be one where a court of equity, under equitable rules, has jurisdiction; or he may bring a common-law action against all the persons engaged in the abatement of the nuisance to recover his damages, and thus he will have due process of law; and if he can show that the alleged nuisance does not in fact exist he will recover judgment, notwithstanding the ordinance of the board of health. Thus the views we take of these acts and similar acts conferring powers upon local officers to proceed summarily upon their own view and examination furnish adequate protection to boards of health, to the public, and to property owners; and while these views are not supported by all the decided cases upon the subject, they have the support of the best reasons and of ample authority. In Cooley's Constitutional Limitations, 5th edition, at page 722, in a note the learned author, speaking of boards of health, says: "Though they cannot be vested with authority to decide finally upon one's right to property, where they proceed to interfere with it as constituting a danger to health, yet they are vested with *quasi* judicial power to decide upon what constitutes a nuisance, and all presumptions favor their actions." And again, at page 742, in a note citing authorities, he says: "Whether any particular thing or act is or is not permitted by the law of the state must always be a judicial question, and therefore the question what is and what is not a public nuisance must be judicial, and it is not competent to delegate it to local legislative or administrative boards. The local declaration that a nuisance exists is therefore not conclusive, and the party concerned may contest the fact in the courts."

Dillon in his work on Municipal Corporations, fourth edition, section 374, says: The authority to prevent and abate nuisances and its summary exercise "may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal nature of a nuisance; but such power conferred in general terms cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which in its

nature, situation, or use is not such." In Wood's Law of Nuisances, section 740, it is said that where the public authorities abate a nuisance under authority of a city ordinance "they are subject to the same perils and liabilities as an individual if the thing abated is not in fact a nuisance. . . . It would indeed be a dangerous power to repose in municipal corporations to permit them to declare by ordinance or otherwise anything a nuisance which the caprice or interests of those having control of its government might see fit to outlaw without being responsible for all the consequences; and even if such power is expressly given by the legislature it is utterly inoperative and void unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance and in defiance of it."

In *Yates v. Milwaukee*, 10 Wall. 497, Mr. Justice Miller said: "It is a doctrine not to be tolerated in this country that a municipal corporation without any general laws, either of the city or the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the ¹⁰ uncontrolled will of the temporary local authorities." In *Hutton v. City of Camden*, 39 N. J. L. 122, 23 Am. Rep. 203, it was held that the action of the board of health could not determine conclusively that a nuisance exists, and that such a conclusive determination could be made only in a regular course of law before an established court of law or equity. In *Underwood v. Green*, 42 N. Y. 140, the action was to recover the value of dead hogs removed under the direction of the city sanitary inspector, an officer clothed with judicial discretion, and acting under a city ordinance declaring that all dead animals "be forthwith removed and disposed of by removal beyond the limits of the city, or otherwise, so as most effectually to secure the public health"; and it was held that it must be shown, in order to justify the act, that the dead hogs were or would become in some way dangerous or deleterious to public health. The following are also instructive authorities upon the same subject: *Mayor etc. v. Board of Health*, 31 How. Pr. 385; *Clark v. Mayor etc.*, 13 Barb. 82; *Rogers v. Barker*, 31 Barb. 447; *Coe v. Schultz*, 47 Barb. 64; *Lawton v. Steele*, 119 N. Y. 226; 16 Am. St. Rep. 818.

The result of these authorities is that whoever abates an

alleged nuisance, and thus destroys or injures private property, or interferes with private rights, whether he be a public officer or private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril, and when his act is challenged in the regular judicial tribunals it must appear that the thing abated was in fact a nuisance. This rule has the sanction of public policy and is founded upon fundamental constitutional principles.

The way is now clear to the disposition of this case. The board of health did act and had a right to act upon its own inspection and knowledge of the alleged nuisance. It was not obliged to hear any party. It could obtain its information from any source and in any way, and hence its determination upon the question of nuisance is not reviewable by *certiorari*: *People v. McCarthy*, 102 N. Y. 630.

It is claimed, however, on the part of the relator that the¹¹ board of health was not properly organized when it made its determination, and that, therefore, the determination was void.

Under the act of 1881, above cited, there was but one supervisor for the city of Yonkers, and "the supervisor" was made a member of the board of health. By an amendment of the charter in 1892, chapter 54 of the laws of that year, the city was divided into five wards, and one supervisor was required to be elected in each of the wards. The claim of the relator is, that all these supervisors became members of the board of health, and that, therefore, after the act of 1892, the board of health was composed of ten members instead of six, and that as only four members, to wit, the mayor, the president of the board of police, the health officer, and the president of the common council, took part in the proceedings under review, the board was not properly constituted—that, in fact, therefore, the board, as such, did not act, that there was no determination, and that the action taken was a nullity. If this claim be well founded, then there was no judicial determination for review by *certiorari*: *People v. Parker*, 117 N. Y. 86.

But assuming that the question as to the constitution of the board of health is before us, we think it was properly constituted. By the act of 1892 the office of "the supervisor" disappeared, and therefore there was no longer any such officer as "the supervisor." The five supervisors elected in the wards were not made members of the board, and the board was

thereafter composed of but five members, and the four who made the determination in the absence of the fifth were competent to act as the board.

Our conclusion, therefore, is, that the judgment of the general term should be affirmed, with costs.

All concur.

Judgment affirmed.

BOARD OF HEALTH.—NOTICE TO PARTIES INTERESTED, and an opportunity to appear and be heard, is not required under the Massachusetts statutes previous to an order of the board of health to remove a nuisance, but its findings and adjudications, preliminary to incurring the expense of removing the nuisance, are not conclusive upon such parties in an action to recover the money expended in removing the nuisance: *City of Salem v. Eastern R. R. Co.*, 96 Mass. 431; 96 Am. Dec. 650.

NUISANCE.—POWER OF BOARD OF HEALTH TO DECLARE WHAT IS: See the extended note to *Hutton v. City of Camden*, 23 Am. Rep. 212, and the note to *Janesville v. Carpenter*, 20 Am. St. Rep. 136.

MUNICIPAL CORPORATIONS.—LIABILITY FOR ABATING NUISANCES.—If a municipality, acting under a general power to abate nuisances, abates as a nuisance that which is not such in fact, it does so at its peril: *Orlando v. Pragg*, 31 Fla. 111; 34 Am. St. Rep. 17, and note with the cases collected.

OBJECTIONARI TO REVIEW THE FINDINGS OF A BOARD OF HEALTH declaring a certain occupation a nuisance will be denied when notice was not given to the party conducting the same: *People v. Board of Health*, 33 Barb. 344, cited in the note to *Mayor v. Morgan*, 18 Am. Dec. 237.

TRIPPE v. PROVIDENT FUND SOCIETY.

[140 NEW YORK, 23.]

ACCIDENT INSURANCE.—NOTICE OF DEATH OR OF ACCIDENT.—Though a policy of insurance against accidental injury requires notice to be given in writing stating the full particulars of the accident and injury within ten days after injury or death, the failure to give such notice within the time specified does not absolve the insurer from liability if it was caused by the death of the party injured under such circumstances that it was not known until several days thereafter, and the notice was given within ten days after the discovery of his body and of the fact of his death.

ACCIDENT INSURANCE, WAIVER OF NOTICE OF DEATH.—If a notice of a death by accident is given at a later date than was stipulated in the policy, but is retained without objection and the insurer furnishes blank proofs of loss, and, on their being filled out and forwarded, also retains them without objection, and subsequently demands further information, which is furnished, the insurer waives the objection that the notice was not given in time.

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John L. Hill, for the appellant.

William Henry Arnoux, for the respondent.

²⁵ O'BRIEN, J. The defendant is an accident insurance company, upon the co-operative or assessment plan, and on the thirteenth day of March, 1891, issued its policy or certificate to Frederick W. Trippe, the plaintiff's intestate, whereby it agreed upon the considerations referred to in the instrument to pay to him certain sums specified as a weekly indemnity on account of disability from accidents within the terms of the contract, and also for the sum of five thousand dollars in case of death "through external, violent, and accidental means." The place of business of the insured was in a building near Park place, in the city of New York, which, on the 22d of August, 1891, fell, crushing to death in the ruins several of the occupants, and among them the insured. The destruction of this building, and the consequent ²⁶ loss of life, is known in the events of that year as the "Park place disaster." The claim is resisted by the defendant upon the ground that certain conditions expressed in the certificate, which were warranties or conditions precedent to liability, have not been complied with. The most important question and that most strenuously insisted upon by the defendant arises upon the following condition:

"Notice of any accidental injury for which claim is to be made under this certificate shall be given in writing, addressed to the president of the society at New York, stating the full name, occupation, and address of the injured member, with full particulars of the accident and injury, and failure to give such written notice within ten days from the date of either injury or death shall invalidate any and all claims under this certificate."

There is nothing in the case to create any doubt as to the fact that the insured was killed on the day of the accident, but the fact was not known until the 25th, when the body was found among the ruins and identified. Notice of the death was given to the defendant on the second day of September, which was within the ten days from the discovery of the body, but not within ten days from the day of the accident, when, as the defendant insists, the death must have occurred. The condition upon which the defense is based was to operate upon the contract of insurance only subsequent to the fact of a loss. It must, therefore, receive a liberal and reasonable construction in favor of the beneficiaries under the

contract: *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389. The provision requires not only notice of the death, but "full particulars of the accident and injury." It is quite conceivable that in many cases of death by accident the fact cannot be and is not known until days or even weeks after it has occurred. Such conditions in a policy of insurance must be considered as inserted for some reasonable or practical purpose, and not with a view of defeating a recovery in case of loss by requiring the parties interested to do something manifestly impossible. The object of the notice was to enable the defendant, within a reasonable ²⁷ time after the death or injury, to inquire into all the facts and circumstances while they were fresh in the memory of witnesses, in order to determine whether it was liable or not upon its contract.

The full particulars of the death which the condition requires cannot ordinarily be furnished until the fact of death and the manner in which it occurred are ascertained. In this case all that was known prior to the 25th of August, when the body was found, was the fact that the deceased had his place of business in the building and that it had been destroyed. But it did not follow from these facts that the insured was dead, as he might have been absent from the building at the time, or in some way escaped from the result of the accident, and a notice served upon the defendant prior to the time when the body was found, and the fact of death ascertained, would not be within the object or terms of the condition. The parties having contracted that the notice of death should be accompanied by full particulars of the manner in which it occurred and the attendant circumstances, they evidently intended that it should be given only when the fact and manner of death became known to the parties who were required to act. The fair and reasonable construction of this condition, therefore, is that the ten days within which the notice is to be given did not begin to run from the date of the accident or the disappearance of the insured, but from the time when the body was found, and the important fact of death, with the circumstances and particulars under which it occurred, ascertained. This construction secures to the defendant every benefit and advantage that was intended by this provision of the policy, and it cannot, therefore, complain if the very harsh and technical meaning which it now seeks to put upon a condition subsequent is rejected. The plaintiff was the widow of the deceased and the beneficiary named in the certificate.

She was the only party interested in the enforcement of the contract, and who could give the notice, and she could not give it, within the meaning of the condition, until she had knowledge of the facts which she was bound to communicate. To hold that the plaintiff was bound to give notice ²⁸ of the death of her husband, with full particulars, before she had any knowledge of the facts, would be to require her, by a technical and literal construction, to do an impossible thing, which was not within the intention of the parties when the contract was made: *Insurance Companies v. Boykin*, 12 Wall. 433.

But even if the defendant's construction of this condition was correct, we think by its acts the objection has been waived and cannot now be urged as a defense. The notice served on the 2d of September was retained without objection, and another served on the 15th of October, after the plaintiff had been appointed administratrix. On the twelfth day of October upon written application to the defendant it furnished the necessary blanks for proofs of loss. These proofs were made and forwarded to the defendant in compliance with the terms of the contract, and were retained without objection. On the 19th of March following, the defendant called for further information, which was given. It is well settled that such defenses are waived when the company, with knowledge of all the facts, requires the assured by virtue of the contract to do some act, or incur some expense or trouble inconsistent with the claim, that the contract had become inoperative in consequence of a breach of some of the conditions: *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389; *Roby v. American Cent. Ins. Co.*, 120 N. Y. 510; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, 419; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495; *Goodwin v. Massachusetts Mut. Life Ins. Co.*, 73 N. Y. 480; *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108; *Jones v. Howard Ins. Co.*, 117 N. Y. 103; *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 560; *Travellers' Ins. Co. v. Edwards*, 122 U. S. 457.

The acts of the defendant in receiving and retaining these papers without objection and calling for others are consistent only with the theory that the contract was still considered in force, and as the plaintiff acted accordingly, in performance of its conditions, subsequent to the loss, the defendant ought not to be permitted now to change its position and assert that after ten days from the accident the obligations of the policy ²⁹ virtually ceased by reason of failure within that time to serve notice of death.

The deceased stated in his application, which is part of the policy, and a warranty that his business was that of a "wholesale drug merchant." It is now urged that the contract is avoided for the reason that this statement or representation was untrue. This point is based upon evidence tending to show that some of the articles that the deceased kept in his store and dealt in were of such a character as to deprive him of the right to be classified for accidental insurance as a wholesale druggist. Without further reference to the merits of this objection it is sufficient to say that it is not available to the defendant in this court for the reason that the testimony introduced did not conclusively establish any breach of warranty in this respect. At best the question was one of fact, and the disposition made of it by the learned trial judge was sufficiently favorable to the defendant when he submitted it to the jury. No exception was taken by the defendant to this course or to the instructions given by the court to the jury upon the submission of the question, and obviously none could have been. In fact the only question submitted to the jury was whether this statement was true. The only objection that the defendant made to this disposition of the case was to request a submission also of the question as to the date of the death of the insured, which request was properly refused as the sufficiency of the notice of death served presented a question of law.

The other exceptions in the record have been examined, and as they disclose no error prejudicial to the defendant the judgment should be affirmed.

All concur.

Judgment affirmed.

ACCIDENT INSURANCE—CONSTRUCTION OF POLICY.—The terms of an accident insurance policy should be liberally interpreted in favor of the insured: *McGlinchey v. Fidelity etc. Ins. Co.*, 80 Me. 251; 6 Am. St. Rep. 190, and note.

LIFE INSURANCE—NOTICE AND PROOF OF DEATH—WAIVER.—Where a policy of life insurance requires notice and proof of death as a condition precedent to payment, notice alone is not sufficient, and though the insurers, on receipt of such notice, do not call for further proof, they do not thereby waive their right to insist upon it: *O'Reilly v. Guardian etc. Ins. Co.*, 60 N. Y. 169; 19 Am. Rep. 151; see the note to *Welsh v. London Assur. Corp.*, 31 Am. St. Rep. 794. In the absence of any agreement, a waiver of forfeiture of a policy of life insurance results only from transactions with the insured by which the insurer after knowledge of the forfeiture recognizes the continued existence of the policy: *Ronald v. Mutual etc. Life Assn.*, 132 N. Y. 373.

MACK v. SNELL.

[140 NEW YORK, 193.]

BAILMENT.—A CONTRACT WHEREBY ONE PARTY IS TO FURNISH CERTAIN MATERIALS, to which the other is to add other materials, and also to perform labor so as to manufacture a specified number of pruning-shears, is a contract of bailment, and not of purchase and sale, and the title to the completed shears is at all times in the person for whom they were manufactured.

ACCESSION.—WHERE THE PRINCIPAL MATERIALS NECESSARY TO THE MANUFACTURE of articles are furnished by one party, and another is to furnish other materials and to perform labor so as to complete the manufactured articles, the materials added by the latter become by accession the property of the former, to whom the whole of the manufactured articles belong, though he refuses to receive them because they are not manufactured in the manner exacted by the contract between the parties.

MANUFACTURER.—THE RETENTION OF MANUFACTURED ARTICLES upon which the manufacturer has performed labor and furnished a portion of the materials does not entitle him to recover the price agreed to be paid for such manufacture if the work was not done in the manner stipulated for, and the articles manufactured were valueless because of defects in their construction.

MANUFACTURE OF ARTICLES CONTRACTED FOR, DEFECTS IN, WHEN NOT WAIVED BY SILENCE OR ACCEPTANCE.—If a contract is made for the manufacture of articles from materials furnished the manufacturer by the other contracting party, the latter, because the title is in him, may retain the manufactured articles, and is not bound to inspect them, nor to notify the manufacturer of objections thereto, and, on the latter's suing for his work, may defend on the ground that it was not performed as stipulated in the contract.

CONTRACT TO MANUFACTURE ARTICLES, COUNTERCLAIM FOR VIOLATION OF. In an action to recover compensation for services rendered in manufacturing articles from materials furnished by the other contractor, the latter, on establishing that the former did not perform his work in the manner stipulated for in the contract, may recover the value of the contract to him, in case plaintiff had performed it, measured by the difference between the price agreed to be paid by the defendant and the market value of the articles had they been manufactured according to the contract.

ACTION to recover for labor performed and materials furnished in the manufacture of one thousand pruning-shears under a contract by which defendant was to furnish the castings for the handles, and the small castings around which the springs were coiled, and have them japped, and the plaintiffs were to furnish the blades and complete the articles according to the sample. The answer contained a counterclaim, alleging that the shears were warranted, and that they were not made as stipulated in the contract between the par-

ties. The referee found that the shears were not made according to sample, and were worthless, and directed judgment in favor of the defendant on the counterclaim. This action of the referee was affirmed by the trial court, and judgment entered accordingly.

Henry M. Hill, for the appellant.

Heman W. Morris, for the respondent.

¹²⁵ *ANDREWS*, C. J. The referee found, and both parties concede, that the contract between the parties was one of bailment and not of purchase and sale. The consequence follows that the title to the completed shears was at all times in the defendant. The materials added by the plaintiffs in performing their contract became by accession, when joined with the material furnished by the defendant, the property of the latter, he having furnished the principal part, the part furnished by the plaintiff being accessorial merely: *Pierce v. Schenck*, 3 Hill, 28; *Foster v. Pettibone*, 7 N. Y. 435; 57 Am. Dec. 530; *Merritt v. Johnson*, ¹²⁶ 7 Johns. 473; 5 Am. Dec. 289. When, therefore, the plaintiffs delivered to the defendant in January, 1884, one hundred and forty-six pairs of completed shears it was a delivery to the defendant of his own property, and the title to the undelivered shears, completed in March, 1884, was also in the defendant, notwithstanding his refusal to receive them. The plaintiffs agreed to manufacture the shears, using the handles furnished by the defendant, for the sum of seventy-four cents per pair, to be made in all respects like the sample. The referee found that the shears manufactured were not like the sample, but were defective by reason of not conforming thereto, whereby they were useless and of no value, and that the defects were not discoverable by inspection of the shears in their completed state, but that by unscrewing the nut which holds the parts of the shears together, and separating them, the defects could be seen. It is also found that the defendant did not discover the defects in the shears until all the shears had been manufactured and were ready for delivery.

Upon these findings, which are supported by evidence, no action lies in favor of the plaintiffs to recover for work, labor, or materials. They wholly failed to perform their contract in its true scope and meaning. It is plain that under the general rule no compensation can be demanded by the plaintiffs. The consideration upon which the defendant's promise rested has never been furnished. The defendant, it is true, has title

to the shears, but this is because he owned the materials out of which they were made; the articles he contracted for have never been furnished. In place of these were furnished articles useless and valueless because of defects in construction not existing in the sample shears. The claim is made, however, that the plaintiffs are entitled to recover on the contract, not on the ground of performance, but by reason of the omission of the defendant to reject and return the shears delivered in January, 1884, or to notify the plaintiffs that they did not conform to the contract. The silence of the defendant, it is claimed, operated in law as an acceptance of the shears delivered, and precludes him from claiming that those subsequently¹⁸⁷ manufactured of the same kind were defective. The plaintiffs seek to apply the principle governing executory contracts for the manufacture and sale of chattels of a specified kind, subsequently delivered by the vendor in performance of the contract.

In such cases the law imposes upon the vendee the obligation to make examination for the purpose of ascertaining whether the articles delivered conform to the contract, and, if he fails to make inspection within a reasonable time, he will, in the absence of fraud or express warranty, be concluded from afterwards setting up the existence of defects which an inspection would have disclosed. This rule has, we think, no application to a case like this. In the case of vendor and vendee under an executory contract, on delivery of the goods the title passes conditionally only to the vendee. It is necessary to the proper protection of the vendor that the vendee, if he rejects the goods and thereby throws them back upon the vendor, should act with reasonable promptness. It would be unjust to permit him to retain the goods after opportunity for inspection, giving no sign, and subsequently claim that they were not according to the contract. He is bound to express his dissent, and thus enable the vendor to protect his interests. The reason upon which the doctrine governing executory contracts for the sale of chattels subsequently delivered rests is inapplicable to contracts for the manufacture of articles from materials furnished to the manufacturer by the other party to the contract. The title to the things manufactured is in the owner of the materials, whether they conform to the contract or not. The claim of the other party is for work and labor. The employer may await the presentation of the claim of the other party before acting. His reten-

tion of the articles manufactured is the exercise of an absolute right, and he is neither bound to inspect the articles nor to notify the other party of his objections. The omission to object may, in many cases, be material evidence on the question of performance, and, in case of continuous deliveries of articles manufactured from time to time, the duty to speak after knowing the defects might arise. But in the present case the findings exclude the ¹⁹⁸ inference of bad faith on the part of the defendant, or that, knowing that the shears delivered were defective, he remained silent and permitted the plaintiffs to manufacture the others. The fact that the defendant retained the shears delivered, and did not offer to return them after he discovered that they were defective, is no answer to the defense that the plaintiffs had not performed their contract. The defendant's possession followed the title, and the plaintiffs in no event were entitled to have the shears delivered returned to them. The owner of real property who has employed another to erect a house on his land does not, by taking possession of the house and occupying it, preclude himself from denying that the builder has performed his contract: *Smith v. Brady*, 17 N. Y. 173; 72 Am. Dec. 442. In like manner the owner of materials who employs another to manufacture them into garments or chattels of any description does not lose his property in the materials, nor is he precluded by receiving the manufactured articles from asserting his title thereto, and at the same time resisting a recovery for the value of the work, on the ground that the workman had not performed his contract.

In respect to the judgment for the defendant on his counterclaim, we perceive no legal error. It represents the value of the contract to the defendant in case the plaintiffs had performed, measured by the difference between the price agreed to be paid by the defendant for the shears and their market value, if made according to the contract. The claim that as the title to the shears manufactured was in the defendant, the value of the materials should have been deducted, is not presented by any finding or exception, and it cannot be affirmed upon this record that the materials, in the condition in which they then were, were of any value to the defendant. The exception to the finding of the referee that there was an express warranty that the shears should conform to the sample, which warranty would survive an acceptance of the shears, need not be considered. The facts found show that the plain-

tiffs did not perform their contract, and were not entitled to recover thereon. The result reached would not be ¹⁹⁹ affected by an error, if any, in characterizing the plaintiffs' contract to make the shears according to the sample as an express warranty which would survive an acceptance of the shears.

We find no error in the record, and the judgment should be affirmed.

JUDGE O'BRIEN dissented, holding that as the plaintiffs manufactured one hundred and forty-six pairs of shears, and delivered them to the defendant, who made no objection thereto, they were justified in manufacturing the remainder in the same manner, and that the retention of these shears without objection for four years was equivalent to an acceptance, precluding the defendant from raising any objection thereto after the action was brought. Upon this point he said: "The facts found import an acceptance by the defendant, at least of the one hundred and forty-six pairs, as there was delivery, retention of the goods without objection, and no offer to return. Silence and acquiescence on the part of the defendant as to the quality and character of the work naturally led to the manufacture of the balance in the same way, and the question is, under these circumstances, whether the defendant, after the lapse of four years, should be permitted to make the objection that the contract was not substantially performed. The learned referees held that as there was a warranty that survived acceptance, as in case of sale, the defendant was under no obligation to ascertain whether the contract was performed or not, and that, even when he ascertained that the work was defective, he was under no obligation to make his objection known to the plaintiffs. This proposition, as it seems to me, embodies a radical error, which pervades the whole case.

"It is undoubtedly true that a workman who undertakes to make an article from material furnished by another, according to a sample furnished, and to deliver it to him, must show performance in order to recover the stipulated price, and is liable for damages for a breach of his contract. But it does not follow that this liability survives a delivery and acceptance as in cases of sales of goods with warranty. When the owner, without fraud or mistake, expressly or by silence and acquiescence, accepts the article, that liability is at an end, and the workman is entitled to his pay. If a builder contracts to erect a house according to certain plans or after the model of another house, and the owner accepts the work when done, and enters into possession of the house without any objection as to the work or any notice to the builder that the contract has not been performed, with respect to its completion, or the character or quality of the work or material, this would be held to be an admission on his part that the contract was performed, and, in an action for the price by the builder years afterwards, the owner would be concluded by his acts from asserting that the builder had no claim for damages on account of defective work or material. So if cloth be delivered to a tailor to make a coat, and it is delivered to the owner when made, who accepts it, or retains and uses it for a long time, without any objection or claim of defective workmanship, he cannot be heard to claim, when sued for the price of the work, that it was not done according to agreement, and it would not strengthen such a claim to call the workman's agreement to make the coat according to a certain style or pattern a warranty that survived

acceptance. In such cases acceptance, or omission to object within a reasonable time after delivery or opportunity for examination, operates to extinguish all claims for breach of the contract: *Sprague v. Blake*, 20 Wend. 61; *Coplay Iron Co. v. Pope*, 108 N. Y. 232; *Brown v. Foster*, 108 N. Y. 387; *Studer v. Bleistein*, 115 N. Y. 316; *Pickson v. Crooks*, 115 N. Y. 539; 12 Am. St. Rep. 831; *Mason v. Smith*, 130 N. Y. 474; *Norton v. Dreyfuss*, 106 N. Y. 90.

"That element of a contract known to the law as a warranty is peculiar to contracts for the sale of property and policies of insurance. In its application to the sale of goods it is but the agreement of the seller that they will correspond to the terms of the contract, with respect to quality or quantity, and this undertaking is so far collateral that it survives an acceptance of the goods by the purchaser. Such a warranty, when it exists, is connected with and belongs to a contract of sale as one of its elements, but, in the sense in which it is understood in the law of sales, can have no application to a bailment, where one party agrees to perform labor upon the materials of another, and to make for the employer an article to correspond with a sample: *Engle v. Taylor*, 98 N. Y. 288; Benjamin on Sales, secs. 610, 673; Sedgwick on Damages, sec. 759; 2 Schouler on Personal Property, sec. 328; Hilliard on Sales, 322 et seq.

"The cases cited by the learned referee and the counsel for the defendant are all, with perhaps one exception, where the question as to the warranty arose upon contracts for the sale of property. It is conceded that in such cases a warranty survives acceptance. The case of *Harrie v. Rathbun*, 2 Keyes, 312, was one of bailment, and the dissenting opinion of Judge Wright states that the warranty could not survive the acceptance by the owner of the lumber which had been sawed from his logs. In the other opinions this point is not noticed, but it distinctly appears that when the owner took the lumber from the mill he objected to the way in which the sawing was done, and notified the sawyer that it was not according to the contract.

"In *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442, it was held that a builder who had agreed to erect a house could not recover without showing that the work was done according to the contract, though the owner had entered into the possession and enjoyment of the house without objection. But in that case it appeared that the evidence of performance was, by the stipulation of the parties, to be the certificate of an architect, which was not furnished. Moreover, the rigorous application of a correct principle in that case has been much relaxed by subsequent cases in this court: *Woodward v. Fuller*, 80 N. Y. 315; *Nolan v. Whitney*, 88 N. Y. 648; *Phillip v. Gallant*, 62 N. Y. 256; *Sinclair v. Tallmadge*, 35 Barb. 602.

"It appears that about seventy pairs of the shears were sold and delivered during the summer of 1884, by a third party to a nurseryman, with the consent and at the request of the defendant, who had the benefit of the sale. This dealing with the property is utterly inconsistent with the position of the defendant now, that the contract was not performed. The findings, however, are too indistinct on this point to make it the basis of a decision upon this appeal. I prefer to let the decision rest upon the ground that the referee erred in applying to this case the doctrine that a warranty, or agreement on the part of the plaintiffs, that the manufactured article would be like the sample, survives the acceptance.

"I think the judgment should be reversed, and a new trial granted, costs to abide the event." Judge Maynard concurred in the dissenting opinion.

BAILMENT—CONTRACT FOR WORK TO BE DONE ON A CHATTEL.—Wheat given to a miller upon an agreement that he should return a given quantity of flour for so many bushels of wheat, constitutes the miller a bailee and not a purchaser: *Slaughter v. Green*, 1 Rand. 8; 10 Am. Dec. 488, and note; *Ledyard v. Hibbard*, 48 Mich. 421; 42 Am. Rep. 474, and note; *Poster v. Pettibone*, 7 N. Y. 433; 57 Am. Dec. 530, and note. See *Central Lithographing etc. Co. v. Moore*, 75 Wis. 170; 17 Am. St. Rep. 186.

ACCESSION.—The owner of the principal materials acquires by right of accession the right of property in the whole where the materials of two persons are united by labor into a joint product: *Pulcifer v. Page*, 32 Me. 404; 54 Am. Dec. 582, and the extended note discussing this subject. See this note particularly at page 586, where the rule of law is laid down that an article manufactured belongs to the owner of the principal materials.

CONTRACT FOR ARTICLE TO BE MADE—COMPLETE PERFORMANCE WHETHER WAIVED BY ACCEPTANCE.—A builder cannot recover unless he has complied with his contract, although the defendant has taken possession of and uses the building: *Smith v. Brady*, 17 N. Y. 178; 72 Am. Dec. 442, and note with the cases collected. The acceptance and use of work performed and materials furnished renders one answerable on an implied promise to pay for the value he has received to the amount whereby he is benefited, though the work done and materials furnished be not in the manner stipulated in a special contract therefor: *McKinney v. Springer*, 3 Ind. 59; 54 Am. Dec. 470, and extended note; *Norris v. School District*, 12 Me. 293; 28 Am. Dec. 182, and note; *Morford v. Martin*, 6 T. B. Mon. 609; 17 Am. Dec. 168. To the same effect see *Bosarth v. Dudley*, 44 N. J. L. 304; 43 Am. Rep. 373.

SALES WITH WARRANTY.—**COUNTERCLAIM FOR VIOLATION OF:** See *Tacoma Coal Co. v. Bradley*, 2 Wash. 600; 26 Am. St. Rep. 890, and *Fairbank Cementing Co. v. Metzger*, 118 N. Y. 260; 16 Am. St. Rep. 753, and note.

SKINNER v. WOOD MOWING AND REAPING MACHINE COMPANY.

[140 NEW YORK, 217.]

PATENT RIGHTS, CONSTRUCTION OF CONTRACT LICENSES THE USE OF.—By a contract in which the defendant agreed to manufacture and use an invention and attach it whenever it would be practicable to all the various machines manufactured and sold by it and to pay plaintiff a royalty on each machine manufactured and sold and having such invention attached, and stipulating that the plaintiff would neither use, nor license others to use, his invention, the parties established the relation between themselves of licensor and licensee of the patented invention. Plaintiff's cause of action to recover compensation is not entire so that one judgment in his favor exhausts his whole right of action, but is in the nature of a demand for royalties, dependent upon the number of machines manufactured to which his invention was applied.

PATENT RIGHTS—A LICENSEE OF A PATENT RIGHT MAY CHANGE HIS POSITION by renouncing his rights and declaring his intention to manufacture in hostility to, and in defiance of, the patent on the ground that

it is a nullity. To do so he must fully announce his position and put himself in the clear and unmistakable attitude of an infringer having no defense except the invalidity of the patent.

PATENT RIGHTS—A CORPORATION LICENSED TO MANUFACTURE ARTICLES AND USE a patented invention does not renounce its rights nor relieve itself from liability as a licensee by its auditing board refusing to pay royalties on the ground that the patent is invalid.

PATENT RIGHTS—A LICENSOR IS ENTITLED TO ASSUME that his licensee remains such until the latter by a clear, definite, and unequivocal notice emanating from lawful and competent authority, throws off the protection of the license and stands admittedly an infringer of the patent, if it is valid.

ACTION to recover royalties from September 1, 1884, to June, 1890, for the use of a patented oiler to be attached to agricultural machines. The defendant, by a parol agreement entered into in 1872, agreed to manufacture and use plaintiff's invention and to attach it to the various machines manufactured and sold by it, and to pay plaintiff a royalty on each machine on which the oiler was used, and the plaintiff on his part agreed not to use or license others to use his invention. In a former action judgment had been entered in plaintiff's favor for all royalties due up to September 1, 1884. Judgment in favor of the plaintiff.

Esek Cowen, for the appellant.

James Lansing, for the respondent.

220 **FINCH, J.** We deem it our duty to affirm this judgment upon two of the propositions asserted by the general term, but without any further expression of opinion as to other matters which were brought into the discussion.

We agree that the contract between the parties established substantially the relation of licensor and licensee of a patented invention, and that the plaintiff's cause of action to recover compensation was not entire, so that the one judgment previously obtained exhausted the whole right of action upon the contract, but was and is in the nature of a demand for royalties, dependent upon the number of machines manufactured to 221 which the invention was applied, and measured by the value of the use to which the latter was thus subjected. The question was fully discussed in the opinion below, and our approval of its reasoning upon the point remains unchanged by the appellant's criticism on the argument. The terms of the contract itself, its peculiar subject matter, and the conduct of the parties under it, all indicate that the

cause of action was not entire and complete upon the execution of the agreement, but that the latter contemplated compensation measured by future use, and giving rise to causes of action severally founded upon subsequent breaches. While the contract as proved lacks the precision and accuracy of detail which would have excluded the question raised, enough is left to justify the construction thus far maintained.

The further contention of the appellant is rested upon the theory that at a period antecedent to the use of the invention for which a recovery has been had, notice was given to the plaintiff that the defendant company renounced their license and refused to further manufacture under it, but should manufacture in the future in hostility to, and defiance of, the patent, on the ground that the latter was invalid and a nullity. It is conceded that a licensee may thus change his position; that while he remains such he cannot question or dispute the validity of the patent, but in order to do so must fully renounce its protection, and put himself in the clear and unmistakable attitude of an infringer, having no defense except in the claimed invalidity of the patent. And the inquiry now is whether any such sufficient notice was given.

The referee has found that about August 1, 1880, the plaintiff demanded payment for the use of his invention up to that date; that the claim was presented to the auditing board of the company, and was rejected by its members, though without any formal vote or resolution; the reason assigned being that the president of the company denied having made any contract with plaintiff, and that they believed the patent to be invalid. They also requested Mr. Parsons, who was the attorney of the company, to notify the plaintiff of their conclusion, ²²² and the latter did so, but without stating any grounds upon which the invalidity of the patent was asserted.

The referee further finds that in June of the year 1882 the plaintiff renewed his application for payment, and did so in a writing which was proved and put in evidence. In that document he asserts that there had been a reissue of his patent; that whether valid or not it had up to that time served to protect the company in the use of the invention which they had applied to their machines as a patented article of which they had the exclusive use, and were in the habit of so representing the facts to the public; and that he desired to effect an arrangement for his compensation. This

paper was presented by Parsons to the auditing committee, he adding at the foot of it, "The whole matter seems to depend on his contract with Mr. Wood, if he had one." The referee further finds that the auditing board again rejected the claim, and a majority of the individual members requested Parsons to so inform the plaintiff, because they believed the patent to be invalid, which the attorney did, though again without specifying the alleged ground of invalidity.

Several facts about these notices challenge our attention. They are a refusal to pay, and give as a principal reason the asserted invalidity of the patent. But they do not in terms renounce its protection; they do not directly or explicitly abandon the position of licensees; they do not assert an intention to continue the manufacture in hostility to the patent and in defiance of its authority. All that can be said is that something of that sort might fairly be inferred from the refusal to pay, coupled with a claim of invalidity. While that is a possible, it is not a necessary, inference, and the licensor was entitled to a distinct and definite and unequivocal notice, such as would leave the company inevitably liable as an infringer if the patent should be sustained. It is quite doubtful whether the defendant intended to take any such position or the plaintiff at all so understood it. Before the notice of 1880, there had been a use of the machine under the patent, and it was for that use that claim was made. The refusal to ³²³ pay, so far as it rested upon an asserted invalidity of the patent, could only mean that the company deemed that a defense although they were and remained licensees. They could not mean anything else, for there is no pretense that prior to that date any notice at all had been given. If at that time the defendant claimed, as it did, that the invalidity of the patent could justify a refusal to pay while the company was licensee, how could plaintiff be expected to infer that the licensee intended to cease to be such or manufacture on any different basis? That the plaintiff did not and was not bound to so infer is evident from what followed. About two years later he again presented a claim for compensation. That the company for that period were chargeable only as infringers and outside of the license does not seem to have entered his mind. On the contrary, he distinctly asserts that up to that very moment the licensees had been manufacturing as such, and so holding themselves out to the public, and he renews his claim on that basis. And now observe the action of the

auditing board and their attorney. If they believed that two years earlier they had renounced their position as licensees, we should expect them to say so, and tell the plaintiff if he had faith in his patent to proceed against them as infringers for two years at least. They say nothing of the kind. They merely repeat their refusal and assertion of the invalidity of the patent, without one word indicating any intended or accomplished change of position. Their own attorney appends to plaintiff's claim a written memorandum that it depends upon the question whether there was in fact a contract with Wood, and so recognizes that if there was there had been no infringement. And it is further to be noted that in a previous suit for royalties accruing after as well as before these notices were given they were not pleaded as a defense against a recovery after their date founded upon an invalidity of the patent.

There is a further difficulty. We may perhaps assume that the defendant's auditing board were vested with authority to pay or reject claims against the company, but we can assume ²²⁴ nothing more than that. No proof is given of any authority conferred upon them beyond the usual functions involved in their official designation. It is not proved that they had any authority to rescind a contract or settle and determine the future action of the company. In the absence of such authority it must be held to reside in the board of trustees, which never acted upon the matter, either formally or informally.

A licensor is entitled to assume that his licensee remains such until the latter, by a clear, definite, and unequivocal notice, emanating from lawful and competent authority, throws off the protection of the license and stands admittedly an infringer if the patent is valid. The licensor is not to be left in a doubtful or uncertain position. He must not be exposed to the double danger of being defeated in a suit for infringement by a plea of license never effectually or authoritatively renounced; or if he sues for royalties, of being beaten because there was merely an infringement, if anything.

We think the alleged notices were insufficient, and so the defendant remained liable as licensee.

The judgment should be affirmed, with costs.

All concur, except PECKHAM, J., not sitting.

Judgment affirmed.

PATENTS—ESTOPPEL OF LICENSEE TO DENY VALIDITY OF.—The licensee of a patentee who has used the invention is estopped to deny the validity of the patent in an action for royalties; *Clark v. Amoskeag Mfg. Co.*, 62 N. H. 612; *Hyatt v. Ingalls*, 124 N. Y. 93; *Kroegher v. McConway etc. Co.*, 149 Pa. St. 444. See also *Dahell v. Fahy's Watch Case Co.*, 138 N. Y. 285.

BARTH v. BACHUS.

[189 NEW YORK, 289.]

CONFLICT OF LAWS.—A VOLUNTARY ASSIGNMENT BY A DEBTOR of all his property for the benefit of his creditors valid by the law of his domicile will prevail against the lien of an attachment subsequently issued in another state or country in favor of a creditor there, whether citizen or nonresident, upon a debt of the original assignor embraced in the assignment, provided the recognition of the title under the assignment does not contravene the statutory law of the state, or is not repugnant to its public policy.

CONFLICT OF LAWS.—TITLE TO PERSONALTY ACQUIRED IN INVITUM UNDER FOREIGN INSOLVENCY OR BANKRUPT LAWS will not be recognized in another jurisdiction where it comes into conflict with the rights of creditors pursuing their remedies there against the property of the debtor, although the proceedings were instituted subsequently to, and with notice of, the transfer in insolvency or bankruptcy.

INSOLVENCY LAW, WHAT IS.—A statute authorizing assignments to be made for the benefit of all the creditors of the assignor, and declaring that every person, whether resident within or without the state, accepting a dividend out of the assigned estate, or in any way by proving his claim or otherwise participating in the proceedings under the assignment, shall be held to have assented to, and to be bound by, any order of the court discharging the assignor from his debts, is an insolvent law; and an assignment made thereunder does not transfer title to property in another state as against a creditor attaching in such other state, although he was a resident of the state wherein the assignment was made.

CONFLICT OF LAWS.—WHEN NONRESIDENT CREDITORS SUING IN THIS STATE AND HERE ATTACHING PROPERTY are brought into conflict with an assignment made by their debtor in another state for the benefit of his creditors, they are accorded the same rights as resident creditors, and if the latter can successfully oppose such assignment, so may the former.

ACTION by plaintiff as assignee for the benefit of the creditors of the Wilkin Manufacturing Company, a Wisconsin corporation, against the Canton Lumber Company, a domestic corporation, to recover a sum due for machines furnished. The debt sued upon had before the commencement of the action been attached in suits against the plaintiff's assignor, and the sum due was paid into court and the attaching creditors substituted as defendants in place of the lumber company.

Nelson L. Robinson, for the appellant.

Thomas Spratt and Ledyard P. Hale, for the respondent.

²²⁴ ANDREWS, C. J. The general rule that the validity of a transfer of personal property is governed by the law of the domicile of the owner is in most jurisdictions held to apply to a transfer by voluntary assignment by a debtor of all his property for the benefit of creditors, as well as to a specific transfer by way of ordinary sale or contract; and the title of such assignee, valid by the law of the domicile, will prevail ²²⁵ against the lien of an attachment issued and levied in another state or country subsequent to the assignment, in favor of a creditor there, whether a citizen or nonresident, upon a debt or chattel belonging to the assignor, embraced in the assignment, provided the recognition of the title under the assignment would not contravene the statutory law of the state, or be repugnant to its public policy. The decisions are not uniform, but this is the general rule, supported by the preponderating weight of authority, and is the settled law of this state: *Ockerman v. Cross*, 54 N. Y. 29; Bishop on Insolvencies, secs. 241, 265, and cases cited. But this general rule is subject to a qualification established in the jurisprudence of the American states, that a title to personal property acquired *in invitum* under foreign insolvent or bankrupt laws, good according to the law of the jurisdiction where the proceedings were taken, will not be recognized in another jurisdiction where it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor, although the proceedings were instituted subsequent to and with notice of the transfer in insolvency or bankruptcy: *Holmes v. Remsen*, 20 Johns. 229; 11 Am. Dec. 269; *Kelly v. Crapo*, 45 N. Y. 87; 6 Am. Rep. 35; *In re Waite*, 99 N. Y. 433; 2 Kent's Commentaries, 406, 407. This exception proceeds upon the view that to give effect to such a transfer arising by operation of law, and not based upon the voluntary exercise by the owner of the *jus disponendi*, would be to give the foreign law an extraterritorial operation, which the rule of comity ought not to permit to the prejudice of suitors in another jurisdiction. The cases in this state since the case of *Holmes v. Remsen*, 4 Johns. Ch. 460, 8 Am. Dec. 581, in which the chancellor sought to maintain the English doctrine on the subject, have uniformly sustained the rights of domestic attaching creditors against a title under a prior statutory

assignment in another state or country, the several states of the union being treated for this purpose as foreign to each other: *Willitts v. Waite*, 25 N. Y. 577; *Johnson v. Hunt*, 28 Wend. 87; *Kelly v. Crapo*, 45 N. Y. 87; 6 Am. Rep. 35.

236 The general question in this case involves the point whether the assignment made by the Wilkin Manufacturing Company, under the statute of Wisconsin, is to be treated as a voluntary assignment, not in conflict with our laws or policy, or whether, in view of the compulsory clauses of that statute, it is to be regarded as in the nature of a bankrupt law, and ineffectual to transfer title to the property of the insolvent in our jurisdiction as against attaching creditors. In considering whether the title of the assignee in Wisconsin is paramount to the claims of creditors here, who, subsequent to the assignment, procured attachments against the debt owing to the Wilkin Manufacturing Company by the Canton Lumber Company, a reference to the Wisconsin statute under which the assignment was made, becomes important. The original statute upon the subject of voluntary assignments by failing debtors, was similar to the statute in this state upon the same subject. It was a statute prescribing the conditions of such assignments and regulating the administration of the trust for the protection of creditors. In 1889 radical changes were made in the statutory system of Wisconsin, and the prior statute was amended. The amendments, among other things, provided that the assignor in a voluntary assignment for the benefit of his creditors, made under, or in pursuance of, the laws of the state, "may be discharged from his debts as a part of the proceedings under such assignment, upon compliance with the provisions of this act." It further declared that every creditor of the insolvent debtor residing within or without the state who should accept a dividend out of the assigned estate, or in any way, by proving his claim or otherwise, participate in the proceedings under the assignment, shall be "deemed to have appeared in the matter of such assignment and the application for a discharge, and should be bound by any order or discharge granted by the court," subject to the right of appeal. Under the statute, a creditor, by accepting a dividend, thereby consented to a discharge of the debtor from the portion of the debt remaining over and above his share of the assets, and unless a creditor comes in under the assignment, he is debarred 237 from receiving anything out of the assigned property, unless indeed a surplus

should remain after payment of the participating creditors in full, although it seems the debt would remain as a claim against the insolvent.

The power to discharge a contract without payment or satisfaction, and without the consent of the parties, is a power which pertains to the sovereign alone. The statute of Wisconsin does not assume to discharge the debts owing by the insolvent assignor absolutely. But, as has been said, it deprives creditors who do not come in under the assignment of all share in the assigned estate, unless in the improbable contingency of a surplus. This coercive feature of the scheme, if contained in a voluntary general assignment for the benefit of creditors, would render the assignment void: *Grover v. Wakeman*, 11 Wend. 189, 25 Am. Dec. 624. The statute of Wisconsin, however, incorporates this feature, and the law is recognized by the courts of Wisconsin as an insolvent law: *Holton v. Burton*, 78 Wis. 321; *Hempstead v. Wisconsin etc. Ins. Co.*, 78 Wis. 375. This court had occasion, in the case of *Boese v. King*, 78 N. Y. 471, to consider a similar provision in a statute of New Jersey, regulating voluntary assignments for the benefit of creditors in that state, and it was assumed that the provision in that act was in the nature of a bankrupt law. Effect cannot be given here to this coercive feature in the Wisconsin law, except by giving extraterritorial effect to the law of that state. The assignor had no power to make such a condition, and if it is legal it is by force of the statute alone. This feature is one of the distinguishing tests of an insolvent or bankrupt law. The assignment was voluntary in the sense that the Wilkin Manufacturing Company were not coerced into executing it, and the title to the property was vested in the assignee by its own act. But, whether it is to be treated as voluntary in another jurisdiction, when the claims of creditors there are in question, is the point. The assignment purports to have been made under and in pursuance of the law of Wisconsin. The assignor, by proceeding under that law, presumably designed to avail itself of the provision for a discharge. ²²⁸ This could only be accomplished by force of the law. The right of an insolvent or bankrupt to initiate voluntary proceedings in bankruptcy is a common feature in bankrupt laws, but that fact does not make the assignment voluntary, so as to give extraterritorial operation to the proceedings. This point was adverted to in the case of *Upton v. Hubbard*, 28 Conn. 274, 73 Am. Dec. 670,

where the court said: "In our view there is essentially no difference whether, in consequence of an act of bankruptcy, as in England, the bankrupt's estate is forced from him, or he himself sets the law in motion by a conveyance in bankruptcy in the first instance." Under the Wisconsin statute the transfer is voluntary, but the law steps in and regulates the distribution of the assigned estate in accordance with conditions which the sovereign alone can prescribe. It would, we think, be disregarding the substance to hold that the voluntary feature of the law distinguishes it from the class of bankrupt or insolvent statutes which, by general consent in this country, are held to be ineffectual to transfer the title of the insolvent to property in another state, as against attaching creditors there.

It is insisted, however, in behalf of the plaintiff that, assuming that the title of the assignee would be subordinate to the lien of attachments, issued here at the suit of resident creditors, this priority cannot be claimed in behalf of Wisconsin creditors who, knowing of the assignment, seek to gain a preference under our attachment laws, and that the banks to whom the claims were assigned after maturity, and who took with notice of the assignment, stand in no better position than the original creditors. In some of the states, which refuse to recognize the validity of the title of a foreign assignee, even in case of voluntary assignment, where it comes in conflict with the claims of domestic creditors, a distinction is made, and it is held that where the domicile of the foreign assignee and the creditor is the same, the latter will be bound by the title of the former, good by the law of the common domicile: *May v. Wannemacher*, 111 Mass. 202; *Sanderson v. Bradford*, 10 N. H. 260; *Moore v. Bonnell*, 31 N. J. L. 90. The ²³⁹ principle of comity in these states is held to apply so as to subject nonresidents to the operation of the foreign law, but not so as to prevent domestic creditors from pursuing their remedy in defiance of the foreign assignment: *Faulkner v. Hyman*, 142 Mass. 53.

The question is not an open one in this state. We have refused to adopt the distinction made in some of the states, and have placed the right of a creditor coming here from the state of the common domicile upon the same footing as that of a citizen or resident creditor, and have sustained the lien of an attachment issued here at the instance of a foreign creditor after proceedings in insolvency had been instituted

in the state of the common domicile of the insolvent and creditor: *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; 38 Am. Rep. 518. There the debtor and attaching creditor were Louisiana corporations. The attachment was issued after the debtor bank had been placed in liquidation under the laws of that state and commissioners had been appointed to take possession of and administer its assets. Danforth, J., after stating the general rule that the law of Louisiana could have no operation here, referring to the point now under consideration, said: "The plaintiff, as we have seen, although a foreign creditor, is rightfully in our courts pursuing a remedy given by our statutes. It may enforce that remedy to the same extent, and in the same manner, and with the same priority as a citizen. Once properly in court and accepted as a suitor, neither the law nor court administering the law will admit any distinction between the citizen of its own state and that of another." How far our courts will enforce the title of a foreign assignee in bankruptcy as between the assignee and the bankrupt or his creditors, where all the parties have a common domicile abroad, was much discussed in the case of *Abraham v. Plestoro*, 3 Wend. 548, 20 Am. Dec. 738, and that case, with others, were reviewed in the case of *In re Waite*, 99 N. Y. 433. The authority of *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; 38 Am. Rep. 518, upon the point now in question was expressly recognized and approved in *Warner v. Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616, and it must be regarded as establishing ²⁴⁰ the law of the state on the subject. In *Warner v. Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616, the court refused to interfere with liens acquired by citizens of this state upon personal property in another state under the laws of that state, belonging to an insolvent resident here, under proceedings commenced after a voluntary assignment for the benefit of creditors, valid by the laws of this state, had been made and delivered. It was in substance held that creditors of the assignor, citizens of this state, were not, because of such citizenship, precluded from taking proceedings in another state hostile to the assignment, for the purpose of acquiring priority in respect of personal property situated there embraced in the assignment: See, also, *Johnson v. Hunt*, 23 Wend. 87. The courts of this state accord to our citizens the same liberty to proceed in another jurisdiction in hostility to assignments executed here which they accord to citizens of other states coming here and instituting proceedings in hos-

tility to transfers in insolvency, valid by the laws of their domicile. The rule in New York on the question is also the rule in other states: *McClure v. Campbell*, 71 Wis. 350; 5 Am. St. Rep. 220; *Rhawn v. Pearce*, 110 Ill. 350; 51 Am. Rep. 691; *Boston Iron Works v. Boston Locomotive Works*, 51 Me. 585; *Upton v. Hubbard*, 28 Conn. 274; 73 Am. Dec. 670. It follows, therefore, that the attachments in question created valid liens on the debt attached in priority to the title under the assignment, assuming the claim of the plaintiff that the banks stood in no better position than the Wisconsin creditors.

The point that the provisions in the Wisconsin statute providing for a discharge of insolvent debtors apply to natural persons only, and not to corporations, is opposed to the statutory construction of the word "person" as defined in the Revised Statutes of that state, and there is nothing in the charter of the corporation, so far as appears, or in the statutes of Wisconsin, which takes from this corporation the general powers which, in the absence of any statutory or charter restriction, belong to corporations to make an assignment in insolvency: *De Ruyter v. St. Peter's Church*, 3 N. Y. 238. This judgment is not, we think, in accord with the law of this ²⁴¹ state, and must, therefore, be reversed. The case was argued at our bar with great ability, and the researches of the several counsel have materially lightened the labors of the court.

The judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

INSOLVENCY—EFFECT OF DISCHARGE IN, ON RIGHTS OF NONRESIDENT CREDITORS.—This question will be found thoroughly discussed in the extended note to *Murray v. Roberts*, 15 Am. St. Rep. 212-221, and *Pullen v. Hillman*, 84 Me. 129, 30 Am. St. Rep. 340, and note with late cases collected. The law relating to the extraterritorial effect of foreign insolvent laws and of assignments thereunder is discussed in the notes to *Milne v. Moreton*, 6 Am. Dec. 481; *McClure v. Campbell*, 5 Am. St. Rep. 223, and *Holmes v. Remsen*, 4 Johns. Ch. 460; 8 Am. Dec. 531, and note. See, also, *Holmes v. Remsen*, 20 Johns 229; 11 Am. Dec. 269. An assignment for the benefit of creditors, giving preference to certain creditors, valid by the laws of another state, where made, will not be upheld by the courts of Minnesota when contrary to the policy and laws of that state as to property situated there: *Matter of Delpay*, 41 Minn. 532; 16 Am. St. Rep. 729, and note.

BOOTH v. ROME, WATERTOWN, AND OGDENSBURG TERMINAL RAILROAD COMPANY.

[140 NEW YORK, 257.]

A RAILWAY CORPORATION CANNOT BE EXEMPTED FROM LIABILITY FOR DAMAGES TO PRIVATE PROPERTY arising from executing its work in the mode authorized by the legislature. The powers granted to such corporations are to be construed as privileges conferred upon the understanding that they are to be exercised in strict conformity to private rights, and under the same responsibility as though the acts done in the execution of such powers were done by an individual.

IF ONE, BY CARELESSNESS IN MAKING AN EXCAVATION ON HIS LAND, CAUSES INJURY TO AN ADJACENT BUILDING, though the owner of the house has no easement of support, he is liable. The law exacts from a person undertaking to do even a lawful act on his own premises, which may produce injury to his neighbor, the exercise of a degree of care measured by the danger, to prevent or mitigate injury.

IF ONE BLASTS ROCK ON HIS PREMISES in order to adapt them to a lawful use, the mode adopted being the only practicable one, and the work being prosecuted with due care and without negligence, any injury resulting to the adjacent premises is not a legal wrong for which an action may be sustained.

INJURY WITHOUT REMEDY.—There are many cases in which the lawful use of one's property causes injury to adjacent property for which there is no remedy, because no right of the adjacent owner is invaded.

THE TEST OF THE PERMISSIBLE USE OF ONE'S OWN LAND is not whether the use causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act was in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy.

THE USE OF EXPLOSIVES IN EXCAVATING LAND is not at the peril of the person using them so as to impose liability for injury caused thereby to adjacent property, irrespective of negligence, if such use is a necessary and usual means of adapting the land to any lawful use, although the means used may endanger the house of a neighbor, provided no rock or other substance is cast upon his premises.

ACTION to recover for damages to plaintiff's house resulting from blasting upon adjacent premises owned by the defendant. The lands of plaintiff and defendant were situated in the city of Rochester. The defendant, a railway corporation, projected an extension of its road, in the construction of which it was necessary to cut a tunnel in a lot owned by it, and situate adjoining the premises of the plaintiff. To excavate the tunnel it was necessary to remove soil to the depth of about ten feet, and to further excavate to the depth of about four feet in the rock. This rock was loosened by blasting with gunpowder, and it was admitted that the effect of

this blasting was by some means to crack the foundations of plaintiff's house, to pull apart beams and joists, and loosen plaster. No rock or other material was by the blasting cast upon plaintiff's land. The defendant exercised due care in conducting the blasting, but the persons conducting it were from time to time, during the progress of the work, notified of the injury which was resulting to plaintiff's property. The jury was instructed by the court that the defendant in using powerful explosives in blasting the rock used them at its peril, and was therefore liable for any injury resulting to plaintiff's house, whether the work was done carefully or negligently. A verdict was therefore found in favor of the plaintiff, and the defendant, having excepted to the instruction of the court, appealed. The trial court also decided that the fact that the defendant was, in the construction of its road, acting under legislative authority, did not exempt it from liability if the case were such that an action could be maintained were it brought by one individual against another.

S. M. French, for the appellant.

David Hays, for the respondent.

²⁷¹ *ANDREWS, C. J.* We entertain no doubt of the correctness of the ruling at the circuit that the defendant stands in no better position in defending the action than if the controversy was between individuals.

The rule that the legislature may, in the public interest and for public purposes, authorize and legalize acts causing consequential injury to private property, not amounting to a taking, without providing compensation, and that the legislative authority may be pleaded in bar of any claim for indemnity, although if the act had been done without such authority an action would lie, has no application to acts of a railroad or other business corporation, in the execution of chartered or statutory powers. The rule adverted to, although operating in some cases with great severity, which compels an individual ²⁷² to bear a special loss for the benefit of the community at large, in place of distributing the burden, is an application of the maxim *salus populi est suprema lex*, and rests upon the transcendent power of the legislature, within constitutional limitations, to enact whatever it may deem essential to the public welfare. But while there are decisions which give countenance to the view that an authority conferred upon a railroad corporation to construct a railroad carries with

it immunity from liability in executing the work for consequential damages to private property, to the same extent as pertains to the sovereign in executing public works: *Bellinger v. New York Cent. R. R. Co.*, 23 N. Y. 42. It is now the settled doctrine in this state that the powers granted to such corporations are to be construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the acts done in execution of such powers were done by an individual: *Cogswell v. New York etc. R. R. Co.*, 103 N. Y. 10; 57 Am. Rep. 701. This doctrine accords with reason, and with the presumed intention of the legislature. The franchises of a railroad corporation are conferred in consideration of supposed public benefits which will result from the construction of its road. The projectors of such an enterprise are moved by considerations of personal advantage. To acquire corporate character and privileges they are willing to subject themselves to certain public duties. But it is quite unreasonable that in executing its corporate powers the corporation should be exempted from liability for injuries to private property, as though it was acting as a strictly public agent. There may be limited exceptions, as in cases of highway crossings, where an adjustment of the grade becomes necessary, working a consequential injury to adjacent landowners which is remediless, and the legislative authority will also bar any remedy for certain discomforts consequent upon the necessary operation of the road, such as noise and smoke of passing trains.

We, therefore, agree with the courts below that the right of ²⁷³ the plaintiff to recover in this case, and the liability of the defendant, depend upon the same rule as would govern the parties if both were natural persons, and the injury to the plaintiff's dwelling had resulted from blasting by an adjacent owner on his land in the course of adapting it to individual uses.

The plaintiff, upon the findings of the jury, sustained a serious injury. It is true that witnesses on the part of the defendant gave evidence tending to show that the house was imperfectly constructed, and that the foundation walls were giving way before the excavation was commenced. But the verdict having been affirmed by the general term, there can be no controversy here that the blasting caused damage to the house to the amount of the verdict. But mere proof that the house was damaged by the blasting would not alone sus-

tain the action. It must further appear that the defendant in using explosives violated a duty owing by him to the plaintiff in respect of her property, or failed to exercise due care. Wrong and damage must concur to create a cause of action.

If the injury was occasioned by the omission to use due care this alone would sustain the action, even if the right of the defendant to use explosives in removing the rock was conceded. If one by carelessness in making an excavation on his own land causes injury to an adjoining building, even where the owner of the house has no easement of support, he will be liable: *Leader v. Moxon*, 3 Wils. 461; *Lawrence v. Great Northern Ry. Co.*, 16 Ad. & E. 643-653; *Leake's Law of Real Property*, 248. The law exacts from a person who undertakes to do even a lawful act on his own premises, which may produce injury to his neighbor, the exercise of a degree of care measured by the danger, to prevent or mitigate the injury. The defendant could not conduct the operation of blasting on its own premises, from which injury might be apprehended to the property of his neighbor, without the most cautious regard for his neighbor's rights. This would be reasonable care only under the circumstances. If it was practicable in a business sense for the defendant to have removed ²⁷⁴ the rock without blasting, although at a somewhat increased cost, the defendant would, we think, in view of the situation, and especially after having been informed of the injury that was being done, have been bound to resort to some other method. There is evidence that the rock from some parts of the excavation was loosened by the use of iron bars, and if this was practicable as to all of it the jury might well have found that this means should have been adopted. So, also, if less powerful blasts might have been used, which, if used, would not have occasioned injury, or would have lessened it, the omission to use them might well be considered as negligence. The mode of exercising a legal right, where there is a choice of means, may of itself give a cause of action. The plaintiff, however, on this record is precluded from claiming that the judgment may be sustained because of negligence in the mode of blasting. It must be assumed from concessions made on the trial and from the rule of law laid down by the court, that blasting was the only mode of removing the rock practically available; that it was conducted with due care, and that it was necessary to enable the defendant to conform the roadbed to the established grade. This is a

case, therefore, of unavoidable injury to the plaintiff's house, occasioned by the act of the defendant in blasting on its own premises, in order to adapt them to a lawful use, the mode adopted being the only practicable one, and the work having been prosecuted with due care and without negligence. The question is, whether the act of the defendant, connected with the resulting injury, was a legal wrong for which the plaintiff has a right of action.

The general rule that no one has absolute freedom in the use of his property, but is restrained by the coexistence of equal rights in his neighbor to the use of his property, so that each in exercising his right must do no act which causes injury to his neighbor, is so well understood, is so universally recognized, and stands so impregnably in the necessities of the social state, that its vindication by argument would be superfluous. The maxim which embodies it is sometimes loosely interpreted as forbidding all use by one of his own property, which annoys ²⁷⁵ or disturbs his neighbor in the enjoyment of his property. The real meaning of the rule is that one may not use his own property to the injury of any legal right of another. The cases are numerous where the lawful use of one's property causes injury to adjacent property, for which there is no remedy, because no right of the adjacent owner is invaded, although he suffers injury. The cases of excavation furnish a striking illustration. The easement of natural support of the land of one by the land of the adjacent owner, applies only to lands in their natural condition, and does not extend so as to give the owner of a building erected on the confines of his land, the right to have it supported laterally by the land of his neighbor; and so it has become the settled doctrine of the law that if one, by excavating on his own land adjacent to the land of his neighbor, using due care, causes a building on his neighbor's land to topple over, there is no remedy, provided the weight of the building caused the land on which it stood to give way. There is in the case supposed damage, but no wrong, because what was done by the adjacent owner was in the lawful and permitted use of his own property: *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Partridge v. Scott*, 8 Mees. & W. 220; *Lasala v. Holbrook*, 4 Paige, 170; 25 Am. Dec. 524; *Thurston v. Hancock*, 12 Mass. 220; 7 Am. Dec. 57.

The fundamental proposition upon which the plaintiff's counsel rests his argument in support of the recovery is that

the use of the explosives in blasting constituted, under the circumstances, a private nuisance, and that according to the general rule of law one who creates or maintains a nuisance is liable for any special injury to person or property resulting therefrom. The right of the defendant to excavate on its land for its roadbed is not challenged, but the right to use the destructive agency of gunpowder in the work of excavation, liable to produce injury, and which did occasion it, is denied. The exception is not to the thing done, but to the mode of doing it. It is to be observed, however, that under the concessions in the case and the rulings on the trial it must be assumed that the excavation could not have been done except by the use of explosives. This mode of doing the work was therefore of ²⁷⁶ the substance of the right, if the right existed at all. It has been frequently said that the right of an owner of land to use his property as he likes does not justify the maintaining of a nuisance or the commission of a trespass, and Blackstone, after stating that where one, by smelting-works on his own land, causes noxious vapors, which injure the corn or grain on his neighbor's land or damages his cattle, this would be a nuisance, proceeds to say, "that if you do any other act in itself lawful, which, yet being done in that place, necessarily tends to the damage of another's property, it is a nuisance, for it is incumbent on him to find some other place to do that act where it will be less offensive": 2 Blackstone's Commentaries, c. 13, p. 218. There are many illustrations in the books of the doctrine stated by the learned commentator, that the use of one's own land for the purpose of a lawful trade may become a nuisance to his neighbor. But whether a particular act done upon, or a particular use of one's own premises constitutes a violation of the obligations of vicinage, would seem to depend upon the question whether such act or use was a reasonable exercise of the right of property, having regard to time, place, and circumstances. It is not everything in the nature of a nuisance which is prohibited. There are many acts which the owner of land may lawfully do, although it brings annoyance, discomfort, or injury to his neighbor, which are *damnum absque injuria*. The case of the building caused to fall by an excavation in an adjoining lot, already referred to, is an illustration. The right of an owner of a mine to excavate the mineral in his mine, although by so doing it causes the water to collect therein and to be discharged into an adjacent mine on a

lower level, thereby causing damage to the mine of such adjacent owner, is another illustration of a lawful use of property followed by damage to the property of another, for which no action lies: *Smith v. Kenrick*, 7 Com. B. 515; *Baird v. Williamson*, 15 Com. B., N. S., 876; *Wilson v. Waddell*, 2 App. Cas. 95. In referring to these cases, in *Hurdman v. North Eastern Ry. Co.*, L. R. 3 C. P. D. 168, the court said: "The owner of lands holds his right to the enjoyment thereof, subject ²⁷⁷ to such annoyance as is the consequence of what is called the natural use by his neighbor of his land, and that, where an interference with his enjoyment by something in the nature of a nuisance is the cause of complaint, no action can be sustained if this is the result of a natural use by a neighbor of his land."

Whether a particular actor thing constitutes a nuisance may depend on the circumstances and surroundings. The use of premises for mechanical or other purposes, causing great noise, disturbing the peace and quiet of those living in the vicinity, and rendering life uncomfortable, or filling the air with noxious vapors, or causing vibration of the neighboring dwellings, constitute nuisances, and such use is not justified by the right of property: *Fish v. Dodge*, 4 Denio, 311; 47 Am. Dec. 254; *McKeon v. See*, 51 N. Y. 300; *Cogswell v. New York etc. R. R. Co.*, 103 N. Y. 10; 57 Am. Rep. 701. These and like cases are those where the property of the owner is appropriated to a permanent use which is a constant and serious interference with the enjoyment by other property owners of their property. But there is a manifest distinction between acts and uses which are permanent and continuous and temporary acts which are resorted to in the course of adapting premises to some lawful use. For example, the erection of an iron building adjacent to a dwelling might, for the time being, cause as much noise and discomfort as would arise from conducting the business of finishing steam boilers on adjacent premises, but this would not constitute a nuisance, and the owner of the dwelling would have no remedy. The streets may be obstructed temporarily, subject to municipal regulations, for the deposit of building materials, and the party would not be chargeable with maintaining a nuisance. The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, was the act or use a

reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy.

²⁷⁸ The rule announced by the trial judge, that the use, by an owner of property, of explosives in excavating his land, is at his peril and imposes liability for any injury caused thereby to adjacent property irrespective of negligence, is far reaching. It would constitute, if sustained, a serious restriction upon the use of property, and in many cases greatly impair its value. The situation in the city of New York furnishes an apt illustration. The rocky surface of the upper part of Manhattan island makes blasting necessary in the work of excavation, and, unless permitted, the value of lots, especially for business uses, would be seriously affected. May the man who has first built a store or warehouse or dwelling on his lot and has blasted the rock for a basement or cellar prevent his neighbor from doing the same thing when he comes to build on his lot adjoining, on the ground that by so doing his own structure will be injured? Such a rule would enable the first occupant to control the uses of the adjoining property, to the serious injury of the owner, and prevent, or tend to prevent, the improvement of property. The first occupant in building on his lot exercised an undoubted legal right. But his prior occupation deprived his neighbor of no legal right in his property. The first occupant acquires no right to exclude an adjoining proprietor from the free use of his land, nor to use his own land to the injury of his neighbor subsequently coming there: *Platt v. Johnson*, 15 Johns. 213; 8 Am. Dec. 233; *Thurston v. Hancock*, 12 Mass. 220; 7 Am. Dec. 57; *Tipping v. St. Helen's Smelting Co.*, L. R. 1 Ch. App. 66; *Campbell v. Seaman*, 63 N. Y. 568; 20 Am. Rep. 567. The fact of proximity imposes an obligation of care, so that one engaged in improving his own lot shall do no unnecessary damage to his neighbor's dwelling, but it cannot, we think, exclude the former from employing the necessary and usual means to adapt his lot to any lawful use, although the means used may endanger the house of his neighbor.

We have found no case directly in point upon the interesting and important practical question involved in this appeal. It was held in the leading case of *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279, that the right of property did not justify the owner ²⁷⁹ of land in committing a trespass on the

land of his neighbor by casting rocks thereon in blasting for a canal on his own land for the use of his mill, although he exercised all due care in executing the work. In that case there was a physical invasion by the defendant of the land of the plaintiff. This the court held could not be justified by any consideration of convenience or necessity connected with the work in which the defendant was engaged. In the conflict of rights the court considered that public policy required that the right of the defendant to dig the canal on his own land must yield to the superior right of the plaintiff to be protected against an invasion of his possession by the act of the defendant.

The case of *Benner v. Atlantic Dredging Co.*, 184 N. Y. 156, 30 Am. St. Rep. 619, was the case of an injury to the plaintiff's house resulting from the jarring caused by the blasting of rocks in Hell Gate, and it was held that the injury was remediless, for the reason that the defendant was acting under the authority of the government of the United States by virtue of a contract authorized by Congress. It has been held that the keeping of gunpowder in large quantities near inhabited dwellings is a nuisance, and in the case of explosion subjects the party keeping it to liability for damages occasioned thereby: *Myers v. Malcolm*, 6 Hill, 292; 41 Am. Dec. 744; *Heeg v. Licht*, 80 N. Y. 579; 36 Am. Rep. 654. So also it has been held that the working of quarries by the use of gunpowder, to the injury of property in the vicinity, gives a right of action: *City of Tiffin v. McCormack*, 34 Ohio St. 638; 32 Am. Rep. 408; *Scott v. Bay*, 3 Md. 431. Many of the cases cited by counsel are cases of the permanent appropriation of property for dangerous or noxious uses causing damage. The distinction between such cases and those where the injury arises from acts done in the necessary adjustment of property for a lawful use by means necessary and not unusual, but involving damage to adjacent property, has been adverted to. We recognize the difficulty of formulating a general rule regulating the rights of adjacent landowners in the use of their property, and we realize how narrow the margin is which separates this from some decided cases. In *Marvin v. Brewster Iron M. Co.*, 55 N. Y. 557, 14 Am. Rep. 322, the opinion ²⁸⁰ of the learned judge who wrote in that case sustains the conclusion we have reached in this case. But the point was not necessarily involved, since it was held that the defendant there had acquired by grant the right to employ blasting in

removing the mineral, and that the plaintiff, a subsequent grantee of the surface, could not complain of injury to his house therefrom in the absence of negligence on the part of the defendant in conducting the work. Judge Folger in that case said: "Whatever it is necessary for him (defendant) to do for the profitable and beneficial enjoyment of his own possession, and which he may do with no ill effect to the adjacent surface in its natural state, that he may do, though it harm erections lately put there." If the learned judge intended to lay down the rule that the owner of land may do anything on his own land which would do no injury to the adjacent property if it had remained in its natural state, the proposition is probably too broad. One may do in a barren waste many things which he could not lawfully do in or near an inhabited town.

But the defendant here was engaged in a lawful act. It was done on its own land to fit it for a lawful business. It was not an act which, under all circumstances, would produce injury to his neighbor, as is shown by the fact that other buildings near by were not injured. The immediate act was confined to its own land, but the blasts, by setting the air in motion, or in some other unexplained way, caused an injury to the plaintiff's house. The lot of the defendant could not be used for its roadbed until it was excavated and graded. It was to be devoted to a common use, that is, to a business use. The blasting was necessary, was carefully done, and the injury was consequential. There was no technical trespass. Under these circumstances, we think the plaintiff has no legal ground of complaint. The protection of property is doubtless one of the great reasons for government. But it is equal protection to all which the law seeks to secure. The rule governing the rights of adjacent landowners in the use of their property seeks an adjustment of conflicting interests through a reconciliation ²⁹¹ by compromise, each surrendering something of his absolute freedom so that both may live. To exclude the defendant from blasting to adapt its lot to the contemplated uses, at the instance of the plaintiff, would not be a compromise between conflicting rights, but an extinguishment of the right of the one for the benefit of the other. This sacrifice, we think, the law does not exact. Public policy is promoted by the building up of towns and cities and the improvement of property. Any unnecessary restraint on freedom of action of a property owner hinders this. The law

is interested also in the preservation of property and property rights from injury. Will it in this case protect the plaintiff's house by depriving the defendant of his right to adapt his property to a lawful use, through means necessary, usual, and generally harmless? We think not.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

LATERAL SUPPORT—LIABILITY FOR REMOVING.—A landowner who exercises his right to remove the earth from his own premises adjacent to another's building must use ordinary care to cause no unnecessary damage to his neighbor's property: *Larson v. Metropolitan etc. Ry. Co.*, 110 Mo. 224; 33 Am. St. Rep. 439, and the extended note thereto thoroughly discussing this subject. See, also, *Schultz v. Byers*, 53 N. J. L. 442; 26 Am. St. Rep. 435, and note.

BLASTING WITHOUT NEGLIGENCE.—LIABILITY FOR: See note to *Ohio etc. Ry. Co. v. Wachter*, 5 Am. St. Rep. 538. The prudent use of blasting to remove hard material in constructing a railway is always deemed to have been in contemplation when the damage was assessed for the right as a necessary incident to the privilege: *Blackwell v. Lynchburg etc. R. R. Co.*, 111 N. C. 151; 32 Am. St. Rep. 786, and note. A contractor, while blasting rocks in a navigable river is not liable, in the absence of proof of negligence in an action by the owner of a house three thousand feet distant from the explosion, injured by the vibrations of the earth caused by the same: *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156; 30 Am. St. Rep. 649. See a further discussion of this subject in the extended note to *Larson v. Metropolitan etc. Ry. Co.*, 33 Am. St. Rep. 469.

REAL PROPERTY—INJURY WITHOUT REMEDY.—One owner of land is not liable to his neighbor for damages resulting to the latter's land from acts done by the former upon his own land, unless the acts are negligently done or the damages are the natural consequences of such acts. He is not liable for all possible consequences that may result from his lawful acts done on his own land: *Gregory v. Layton*, 36 S. C. 93; 31 Am. St. Rep. 857, and note, in which all the notes and cases in this series discussing this subject are collected.

RAILROADS—LIABILITY FOR NEGLIGENCE IN CONSTRUCTION OF ROAD.—The negligence or carelessness of a railroad in constructing its road is a tort for which an action at law will lie: *Pittsburg etc. Ry. v. Gilleland*, 56 Pa. St. 445; 94 Am. Dec. 97, and note; *Richardson v. Vermont etc. R. R. Co.*, 25 Vt. 465; 60 Am. Dec. 283, and note. See the notes to *Larson v. Metropolitan etc. Ry. Co.*, 33 Am. St. Rep. 467, and *Ohio etc. Ry. Co. v. Wachter*, 5 Am. St. Rep. 537. See also *Blackwell v. Lynchburg etc. R. R. Co.*, 111 N. C. 151; 32 Am. St. Rep. 786. But a landowner can maintain no action against a railroad company for any injury which results from building its road in a proper manner: *Johnson v. Atlantic etc. R. R. Co.*, 35 N. H. 569; 69 Am. Dec. 560.

RAILROADS.—LIABILITY FOR DAMAGES, THOUGH CONSTRUCTED IN PURSUANCE OF LEGISLATIVE AUTHORITY: See *Rumsey v. New York etc. Ry. Co.*, 133 N. Y. 79; 28 Am. St. Rep. 600; and *City of Salem v. Eastern R. R. Co.*, 96 Mass. 431; 96 Am. Dec. 650.

PEOPLE v. COMMON COUNCIL OF BUFFALO.

[140 NEW YORK, 300.]

RES JUDICATA.—AFTER AN AWARD AGAINST A CITY, made under and pursuant to the provisions of a statute, and confirmed by the judgment of a court of competent jurisdiction, such city is estopped from contending that such statute is unconstitutional and void because it authorized the auditing and payment of a claim for which the municipality was not answerable.

PERMISSIVE WORDS USED IN STATUTES conferring power or authority upon public officers or boards will be held mandatory when the act authorized to be done concerns the public interest or the rights of individuals.

CONSTITUTIONAL LAW.—ALL CONTRACT OBLIGATIONS are protected from impairment by the state legislature by the provisions of the federal constitution.

CONSTITUTIONAL LAW—THE OBLIGATION OF A CONTRACT IS IMPAIRED by any law which prevents its enforcement or materially abridges the remedy which existed when it was contracted, and does not supply an alternative remedy equally adequate or efficacious.

CONSTITUTIONAL LAW—THE OBLIGATIONS OF A MUNICIPAL CORPORATION CANNOT BE IMPAIRED by restricting its power of taxation to the point of disabling it from performance or by a repeal of the law under which the obligation was to be enforced, or by enacting statutes of limitations that do not allow a reasonable time for bringing an action.

CONSTITUTIONAL LAW—IF A CLAIM AGAINST A CITY HAS BEEN AUDITED AND ALLOWED, and a judgment entered confirming such allowance, the repeal of the statute cannot divest the rights of the holder of the claim. Therefore, notwithstanding such repeal, a writ of mandate should issue to compel the municipality to pay such judgment.

PROCEEDINGS to procure a peremptory writ of mandate requiring the defendant to audit a claim for damages to certain real estate in the city of Buffalo. Judgment for applicant.

W. F. Mackey and George W. Browne, for the appellant.

O. O. Cottle and Daniel McIntosh, for the respondent.

204 O'BRIEN, J. The order appealed from awarded to the relator a peremptory writ of *mandamus*, directed to the common council of the city of Buffalo, commanding them forthwith to audit and adjust the damages sustained by the relator, which had been appraised at five thousand five hundred dollars, in proceedings for opening and regulating a street, and to cause that sum to be raised by a local assessment upon the property benefited by the improvement. The following facts appeared upon the application: In the year 1885 the city of Buffalo instituted proceedings under its charter for the extension of Elmwood avenue, and took property for that purpose, the same having been appraised by commissioners duly ap-

pointed, and payment therefor was made by local assessment. The relator appeared before the commissioners and offered to prove that her property would be damaged by the removal of some buildings adjoining or near her premises. The commissioners refused to allow the proof, for the reason, apparently, that the damages claimed were incidental and consequential, and that as none of her lands were actually taken there was no power to make an award in her favor. The report of the commissioners was confirmed by the common council May 11, 1886, and the assessment was directed. The relator appeared before the common council, and by petition setting forth her claim asked that compensation be made to her for the damage which she alleged would result to her property. Her petition was heard, but not granted, and the common council passed a resolution, which was approved by the mayor, requesting the legislature to authorize by law the payment of a just compensation to her. The legislature did not then act upon the resolution. On the 28th of July, 1887, the city and the relator entered into an agreement, in writing, whereby the relator, in ³⁰⁵ consideration of the transfer to her by the city of certain building and furnishing material, released her claim, and agreed to waive all objections on her part to the validity of the assessment made against her property to pay for the improvement. The matter seems to have rested on this arrangement till the passage by the legislature of chapter 393 of the Laws of 1890, which authorized the common council to audit and allow the claim when appraised, and to raise the amount by local assessment, and pay the same to her. The act provided that the damages should be appraised by three commissioners, to be appointed by the superior court of Buffalo, upon notice to the city, and their report approved by the court, before presenting it to the common council for audit. The commissioners were appointed, heard the claim, and made an award for damages. On the 13th of February, 1891, the court, by its order, duly entered, confirmed the report. On the 3d of March, 1891, the legislature passed chapter 42 of the laws of that year, whereby the act of 1890, authorizing the audit and payment of the claim, was repealed. Notwithstanding this repeal, the relator presented the claim to the common council for audit, and upon their refusal to allow it, or to take any proceedings to provide for its payment by assessment, applied to the court for the writ of *mandamus*. After the confirmation of the report of the commissioners ap-

pointed to appraise the damages, under the act of 1890, by the special term of the superior court, the city appealed from the order to the general term, where the order was affirmed, and no appeal to this court from that order was taken. The city now claims that the act of 1890, which authorized the audit of the relator's claims, was unconstitutional, because it impaired the obligations of the contract between the city and the relator, whereby she agreed to, and did, release all of her claims, and the relator insists that the repealing act of 1891 is void as to her, for the reason that the legislature had no power to affect the right which became vested by the confirmation of the report. As to the contention in behalf of the city it is not necessary to inquire with ³⁰⁶ respect to the power of the legislature to authorize claims founded in justice and equity to be paid by local assessment or otherwise, for the reason that it is not now in any position to question the award. It was made by commissioners appointed under a statute duly enacted. It was confirmed by the court at special term, and that order affirmed at general term. It has thus been adjudged that the relator has a valid claim, and this judgment involves the effect of the release as well as the power of the legislature to pass the statute. The questions which the city now seeks to raise against the award have all been passed upon adversely to its present contention in another proceeding between the same parties, and so long as that judgment remains of record, unreversed and not set aside, its validity and binding effect upon all parties cannot be questioned collaterally, or in a proceeding for its collection or enforcement. The order of the superior court could not have been made without affirming the power of the legislature to pass the law, and, in effect, holding that the release was no obstacle to the enforcement of the relator's claim. The city has acquiesced in the adjudication, and in this proceeding is concluded. The right of the relator to the writ of *mandamus* for the enforcement of the award and the effect of the repealing act remains to be considered. It is contended that the act of 1890 simply conferred power upon the common council to audit the claim, leaving it to their discretion whether it should be exercised or not. The words are that the common council "is authorized to audit and adjust the amount of damages," and when appraised "the same shall be raised, . . . and the amount . . . paid over," etc. It would be a liberal construction of this language in favor of the city to say

that it was simply permissive, but assuming that it was, the rights of the parties must be governed by the rule of law that permissive words used in statutes conferring power or authority upon public officers or bodies will be held to be mandatory where the act authorized to be done concerns the public interest or the rights of individuals: *People v. Board of Supervisors*, 68 N. Y. 114; *People v. Board of Supervisors*, ³⁰⁷ 51 N. Y. 401; *People v. Common Council*, 78 N. Y. 56; *Mayor etc. v. Furze*, 3 Hill, 612; *Lower v. United States*, 91 U. S. 536; *Barnes v. District of Columbia*, 91 U. S. 540.

We have seen that the report of the commissioners under the statute, awarding damages to the relator in the sum of five thousand five hundred dollars, confirmed by an order of the court, had all the force and effect of a judgment creating an obligation on the part of the city to pay: *Woodhull v. Little*, 102 N. Y. 165; *People v. Common Council*, 78 N. Y. 56. It vested in the relator, when the order of confirmation was entered, an absolute right to receive the amount. It created an obligation on the part of the city to pay and in this sense was a contract of the highest nature: *Cornell v. Donovan*, 14 Daly, 295.

All contract obligations are protected from impairment by state legislation by the provisions of the federal constitution. The obligation of a contract is impaired in the constitutional sense by any law which prevents its enforcement, or which materially abridges the remedy for enforcing it which existed when it was contracted, and does not supply an alternative remedy equally adequate and efficacious: *McGahay v. Virginia*, 135 U. S. 662. No property right acquired under a state statute can be divested by repeal: *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684.

The remedy subsisting in a state when and where an obligation is made or created and is to be performed is a part of the obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution and is, therefore, void: *Edwards v. Kearzey*, 96 U. S. 595.

This provision of the constitution cannot be evaded by indirect methods. The obligation of a municipal corporation cannot be impaired by restraining its power of taxation to the point of disabling it from performance, or by a repeal of the law under which the obligation was to be enforced, or by enacting statutes of limitation that do not allow a reasonable

time for bringing the action any more than by open and avowed assaults upon the contract itself. In this case the ~~see~~ repealing act could have no other purpose than to prevent the audit and payment of the relator's claim, but whatever the motive which prompted the legislation, it is clearly inoperative and void as to the award made by the commissioners and confirmed by the court.

The order should, therefore, be affirmed, with costs.

AM concur, except GRAY, J., not voting.

Order affirmed.

STATUTES—PERMISSIVE WORDS WHEN MANDATORY.—When, by statute, power is given to public officers, and the public interests call for its exercise, the language used, though permissive in form, is in effect peremptory: *Bowen v. Minneapolis*, 47 Minn. 115; 28 Am. St. Rep. 333, and note with the cases collected.

STATUTES—WHEN IMPAIR OBLIGATION OF CONTRACTS.—A statute impairs the obligation of a contract if it enlarges, abridges, or in any manner changes the intentions of the parties resulting from the stipulations in the contract: *State v. Carey*, 13 Rich. 493; 91 Am. Dec. 245, and note; *Bailey v. Philadelphia etc. R. R. Co.*, 4 Harr. 389; 44 Am. Dec. 593. The obligation of a contract is impaired if the end contemplated by it is substantially defeated: *Robinson v. Hayes*, 9 Cal. 81; 70 Am. Dec. 638.

STATUTES IMPAIRING OBLIGATIONS OF CONTRACTS—CONSTITUTIONALITY OF. The legislature can constitutionally pass no act impairing the obligation of contracts: *Trustees v. Bailey*, 10 Fla. 112; 81 Am. Dec. 194; *State v. Barker*, 4 Kan. 324; 96 Am. Dec. 175, and note; *Coffin v. Rich*, 45 Me. 507; 71 Am. Dec. 559; *Henderson etc. R. R. Co. v. Dickerson*, 17 R. Mon. 173; 86 Am. Dec. 148, and note. For a full discussion of this subject see the extended notes to *Scobey v. Gibson*, 79 Am. Dec. 495, and *Rockwell v. Hubbell*, 45 Am. Dec. 251.

STATUTES—REPEAL—EFFECT OF.—Rights are not destroyed by the repeal of the law under which they were acquired: *Dixon v. Dixon*, 4 La. 183; 23 Am. Dec. 478; *Trustees v. Bailey*, 10 Fla. 112; 81 Am. Dec. 194, and note; *Williams v. Johnson*, 20 Md. 500; 96 Am. Dec. 613; *Kantake Drainage District v. Commissioners*, 130 Ill. 261. See, also, the extended note to *Todd v. Landry*, 12 Am. Dec. 480, and the note to *Stephenson v. Doe*, 46 Am. Dec. 496.

MATTER OF CHAMBERLAIN.

[140 NEW YORK 890.]

GROWING GRASS PARTAKES OF THE NATURE OF REALTY. It does not go to the executor or administrator, but follows the land, and belongs to the heir or devisee.

APPEAL from a decree settling the account of an administratrix, and charging her with the proceeds of grass grown upon the real property of which she was a tenant for life.

Frank S. Coburn, for the appellant.

Frederick E. Storks, for the respondent.

²⁹² **ANDREWS, C. J.** We think the surrogate erred in charging the executrix with the sum of one hundred and seventy-three dollars and twenty-nine cents, the amount received by her for hay grown upon the farm in 1889. The testator died in June of that year, and the tenant of the farm, who worked it upon shares, cut the grass thereafter, and paid over to the executrix that sum as her share of the proceeds of the hay under the agreement with the testator. The executrix was devisee for life of the farm. Growing grass partakes of the nature of realty. Neither at common law nor under our statute does it go as assets to the executor or administrator, but follows the land, and belongs to the heir or devisee: *Evans v. Roberts*, 5 Barn. & C. 829; *Kain v. Fisher*, 6 N. Y. 597; 2 Rev. Stats., p. 82, sec. 6, subd. 6. On the other hand corn and other annual crops produced by care and cultivation, and not growing spontaneously, are, at common law, as between heir and executor or administrator, treated as chattels, and under our statute are assets for the payment of debts even as against the devisee: 1 Williams on Executors, 70; 2 Rev. Stats., p. 82, sec. 6, subd. 5; *Stall v. Wilbur*, 77 N. Y. 158.

It must be assumed, in the absence of evidence, that the executrix took the proceeds of the hay in the character of life tenant, and not as executrix. There was no change in the ²⁹³ legal character of the grass by any act or contract of the testator in his lifetime. His share in the proceeds of the grass was in the nature of rent reserved, which accrued after the testator's death. The decree should therefore be modified by deducting from the amount charged against the executrix the sum of one hundred and seventy-three dollars

and twenty-nine cents, and any interest which may have been allowed thereon.

The other point urged, that the surrogate erred in not permitting the executrix to read in evidence on the accounting the whole of her preliminary examination, is not well taken. That examination was taken under section 2735 of the code (since repealed) in a proceeding distinct from the accounting, and not a part thereof. Her testimony in that proceeding was admissible against her on the accounting as to any material fact, as her admission, but not otherwise. The surrogate properly ruled that only such parts of the testimony as tended to explain such portions as were offered in evidence by the contestant were admissible in her behalf, and that the fact that a part was offered by the contestant did not open the door for the admission of the whole testimony.

The judgment below should be modified in conformity with this opinion, and as modified affirmed, without costs to either party.

All concur.

Judgment accordingly. —

REAL PROPERTY—WHAT IS.—The fruits of trees, perennial bushes, and grasses growing from perennial roots are, while unsevered from the soil, considered as belonging to it and a part of the realty: *Sparrow v. Pond*, 49 Minn. 412; 32 Am. St. Rep. 571, and note; *Combs v. Jordan*, 3 Bland, 284; 22 Am. Dec. 236. See also *McKennis v. Shows*, 70 Miss. 388; 35 Am. St. Rep. 654.

SENTENIS v. LADEW.

[140 NEW YORK, 463.]

JURISDICTION OVER SUBJECT MATTER.—The courts of the state of New York have jurisdiction of an action commenced therein to recover damages sustained from a trespass upon real property situate in another state, when the defendant does not object to the exercise of such jurisdiction, and the plaintiff has waived his objection by instituting the action.

C. Bainbridge Smith, for the appellant.

George A. Strong, for the appellee.

465 **MAYNARD, J.** The plaintiffs impleaded the defendants in the supreme court for trespass upon real property in the state of Tennessee, alleging damages to the amount of fifty thousand dollars, and demanding judgment for that sum. A defense was interposed, and the issues joined were noticed for

trial, and when the cause was called for the purpose of making up the day calendar, the plaintiffs' attorney announced that they were ready for trial. When the cause was reached on the day calendar the plaintiffs made default, and an order was entered dismissing their complaint, with costs, and with an extra allowance of one thousand dollars. Judgment was subsequently entered in which it was adjudged that the complaint be dismissed, and that the defendants recover of the plaintiffs one thousand one hundred and fifteen dollars and seventy cents, costs and disbursements, and have execution therefor. The plaintiffs subsequently moved to set the judgment aside upon the ground that the court had no jurisdiction of the subject matter of the action, it being for trespass upon real property not situated within the state, and it could not, therefore, enter a valid judgment. The courts below have denied the motion, and the plaintiffs have brought this appeal.

We entertain no doubt that the supreme court had jurisdiction to render the judgment awarded in this action. Under the constitution it has general jurisdiction in law and equity, and of the class of actions to which this cause belongs. It is not prohibited by any statute from entertaining jurisdiction of a suit for damages for injuries to real property in another ~~the~~ state. As was stated by Judge Earl in *Cragin v. Lovell*, 88 N. Y. 258: "It is a general rule of law that actions for injuries to real property must be brought in the *forum rei sitæ*, and this rule of law has been, so far as I can discover, uniformly sanctioned and upheld in this state." But a party may waive a rule of law or a statute, or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public policy or morals are involved, and having once done so he cannot subsequently invoke its protection: *Lee v. Tillotson*, 24 Wend. 337; 35 Am. Dec. 624; *Embury v. Connor*, 3 N. Y. 511; 53 Am. Dec. 325; *Matter of Cooper*, 93 N. Y. 507. If the court acquires jurisdiction of the persons of the parties by due personal service of process, or by their voluntary appearance and submission to its jurisdiction, and the defendant makes no objection to the authority of the court to hear the cause, and the parties proceed to a trial upon the merits, the judgment rendered would be neither void nor voidable for want of jurisdiction, but would be binding and conclusive upon the parties.

The rule of law which the courts will enforce in this class of cases, when objection is duly and seasonably made, is waived by the plaintiff when he brings the action; and by the defendant if he pleads generally and goes to trial without insisting upon its benefits. In all the cases to which counsel refers the question was raised in an appropriate manner by the defendant before trial: *American Union Tel. Co. v. Middleton*, 80 N. Y. 408; *Cragin v. Lovell*, 88 N. Y. 258; *Dodge v. Colby*, 108 N. Y. 445. In *American Union Tel. Co. v. Middleton*, 80 N. Y. 408, it arose on a motion to vacate order of arrest; in *Cragin v. Lovell*, 88 N. Y. 258, and *Dodge v. Colby*, 108 N. Y. 445, on demurrer. It would be an intolerable abuse of the process of the court if the plaintiff could be permitted to select his tribunal and summon his adversary before it, and when defeated in the cause be heard to say that the action was not cognizable by the court, and that the judgment which it had rendered was a nullity. It might be different if the court was one whose jurisdiction was expressly limited by statute, or there was some statutory inhibition of jurisdiction ⁴⁶⁷ in a given case or class of cases. Then consent even might not confer jurisdiction. Such was the case of *Oakley v. Aspinwall*, 3 N. Y. 547, where the statute prohibited a judge from sitting in a cause if he was related to a party, and it was held that even consent could not confer jurisdiction, because the law was not designed merely for the protection of the parties to the suit, but for the general interests of justice.

In *Dudley v. Mayhew*, 3 N. Y. 9, the subject matter was exclusively for the federal courts under the federal constitution and laws to hear, and hence the state courts were prohibited from entertaining jurisdiction. The same principle controlled the decision of *Davis v. Packard*, 7 Pet. 276, and it was there held that if it had been a personal privilege it would have been waived. If jurisdiction is prohibited, and the case is one where consent cannot confer it, it is an unsettled question whether the court, upon dismissing the cause, can render any judgment, even for costs. It does not seem ever to have been the subject of adjudication in this court, and the decisions of the lower courts and of the courts of other states are somewhat conflicting upon this point. As this case does not belong to that class it is unnecessary now to decide the question.

The court having power to award costs and enter judgment could also grant an extra allowance. There was a trial here

for all the purposes of costs. This court cannot review the exercise of the discretion of the trial court. It was an action at law, and damages to the amount of fifty thousand dollars were alleged and demanded. That was the sum "claimed" and "the value of the subject matter involved" in the absence of proof to the contrary, and might properly be taken as the basis of an allowance against the plaintiff. The case is distinguishable from *Hanover Fire Ins. Co. v. Germania Fire Ins. Co.*, 138 N. Y. 252. That was an action in equity. The party against whom the allowance was claimed in his verified pleading denied that the value of the property right involved was as stated in the pleading of his adversary, and it was held that as against him there was not sufficient proof of value to support ⁴⁶⁸ an extra allowance. Here the situation is reversed. The allegation of value is made use of against the party asserting it, and averments or statements of fact in pleadings are always admissible in evidence against the pleader.

The order must be affirmed, with costs.

All concur.

Order affirmed.

JURISDICTION OVER LAND IN ANOTHER STATE.—An action cannot be maintained in this state for damages for trespass committed on land in another state: *Du Breuil v. Pennsylvania Co.*, 180 Ind. 187. The courts of each state have exclusive jurisdiction over questions relating to rights, titles, and interests in and to land within its limits: *Richardson v. De Gueville*, 107 Mo. 422; 28 Am. St. Rep. 426, and note; *Farmers' Loan etc. Co. v. Postal Tel. Co.*, 55 Conn. 334; 3 Am. St. Rep. 53; *Lindley v. O'Reilly*, 50 N. J. L. 636; 7 Am. St. Rep. 802, and note. See further the extended notes to *Alley v. Caspari*, 6 Am. St. Rep. 182; *Molynous v. Seymour*, 76 Am. Dec. 666, and *Newton v. Bronson*, 67 Am. Dec. 95.

PEOPLE v. HAYES.

[140 NEW YORK, 484.]

CRIMINAL LAW—PERJURY—TRIAL OF, WHEN MUST BE POSTPONED.—Upon an indictment for perjury alleged to have been committed in verifying affidavits in a civil action, the fact that such action is still pending does not oust the court of jurisdiction to proceed to the trial of the criminal accusation. Whether such prosecution shall proceed while the civil action is undetermined is a question addressed to the sound discretion of the trial court, and its attention should be called to the matter before entering upon the trial of the criminal charge, and an application made to postpone on that ground.

EX POST FACTO LAW.—A statute permitting the infliction of a lesser degree of the same kind of punishment than was permissible when the offense was committed cannot be regarded as an *ex post facto* law.

BILLS OF ATTAINDER were legislative judgments of conviction; exercises of judicial power by parliament without a hearing, and in disregard of the first principles of natural justice.

AN EX POST FACTO LAW IS A LAW providing for the infliction of punishment upon a person for an act which when committed was innocent, or which aggravates a crime and makes it greater than when committed, or which changes the punishment or inflicts a greater punishment than the law annexed to the crime when committed, or changes the rule of evidence and receives less or different testimony than was required at the time of the commission of the crime in order to convict the offender.

EX POST FACTO LAW.—No STATUTE WHICH MODIFIES the rigor of the criminal law is regarded as an *ex post facto* law. While there may be cases in which it is not possible for courts to uphold a statutory change in the manner of punishment, on the ground that such punishment has been mitigated rather than increased, yet if the change is of that nature which no sane man could by any possibility regard in any other light than as a mitigation of punishment, a statute authorizing such change is not *ex post facto*, though made applicable to offenses committed before its enactment.

EVIDENCE—HUSBAND AND WIFE—CONFIDENTIAL COMMUNICATIONS BETWEEN.—If a husband willfully gives to a third person letters received from his wife, they are released from the operation of the rule as to confidential communications between husband and wife, and left open to be used as evidence against him to the same extent as if no such rule had ever guarded them.

CRIMINAL PRACTICE.—The commission to jail by the court in the presence of the jury of a witness for the defendant, because of the character of the evidence given by him while on the stand, is not a legal error entitling the accused to a new trial.

PROSECUTION and conviction for burglary.

David B. Hill, for the appellant.

Henry B. B. Stapler, for the respondent.

497 **PECKHAM, J.** In January, 1891, there was pending in the supreme court of this state an action brought by one Annie M. Keating against the above defendant. The action was brought to recover on a promissory note alleged to have been made by defendant, dated New York, October 27, 1887, and payable to the order of Annie M. Keating two years after the date thereof, for some two thousand dollars, with interest at six per cent. Judgment by default was entered January 31, 1891, against the defendant in Monroe county for the full amount of the note. A motion was subsequently, and in April, 1891, made on the part of the defendant to open that default, and for the purpose of that motion the defendant in

⁴⁸⁸ New York county swore to an affidavit that he never owed Annie M. Keating a dollar in his life; that he had never given to her a promissory note, and that he had never seen the note upon which the action was brought, and knew nothing whatever about it; that at the time the note bore date the defendant was in Florida, and remained there the whole winter, and that he went there the 1st of September, 1887, and did not return until May, 1888. The default was opened, and an answer was thereupon interposed, setting up substantially the facts as contained in the affidavit. The action is still pending, never having been brought to trial.

In January, 1892, the defendant was indicted by the grand jury of the county of New York for perjury in swearing to the affidavit, the indictment averring that the allegations of fact set forth in the affidavit and above mentioned were false to the knowledge of the defendant, and that in swearing to them the defendant had committed willful and corrupt perjury.

In February, 1893, the defendant was placed on trial for the offense in the court of general sessions of New York. He had previously been tried at the same term upon the same indictment, and the jury had disagreed.

Upon the second trial the defendant was convicted, and sentenced to imprisonment in the state prison for eight years, and he is now undergoing such imprisonment, a stay of proceedings after the conviction having been refused. From an affirmance of the judgment by the general term the defendant has appealed here.

The counsel for the defendant has argued several grounds for a new trial, some of which will be now referred to:

1. It is claimed on behalf of the defendant that when it appeared, as it did in the course of the trial, that the civil suit brought by Annie M. Keating against him had not yet been tried and determined upon its merits, the court should have deferred the trial upon its own motion until the determination of that action. It is conceded that no motion was made to postpone the trial of the indictment until after the determination of the ⁴⁸⁹ civil action. The record does show that the counsel for the defendant, in the course of the trial of the indictment and after a large amount of evidence had been given, made the objection that no indictment for perjury could stand while the action in which it is alleged it was committed is still undetermined, and that the court had no juris-

diction to proceed with the trial of the indictment. This objection was overruled. Again, the counsel asked the court to charge the jury that the court had no jurisdiction to try the indictment until the determination of the civil action. This was refused and an exception taken.

The court committed no error in refusing to hold as requested by the counsel.

It is not a question of jurisdiction at all. The court had jurisdiction over the offense and over the person of the defendant, and whether the civil suit had or had not been determined was a matter of not the slightest importance upon that question. The English authorities cited in the brief of counsel only show what is said to have been the practice in the English courts, which was to postpone the trial of the indictment until after the disposition of the civil action, not because the court had no jurisdiction to try the indictment before that event, but because, as matter of judgment, it was thought better to take such a course: *Rex v. Simmons*, 8 Car. & P. 50; 84 Eng. Com. L. 603, note a. The rule in Pennsylvania does not show that the court has held that there was a lack of jurisdiction: *Commonwealth v. Dickenson*, 5 Pa. L. J. 164. The rule is one of convenience and propriety, addressed to the sound discretion of the court, and the attention of the court should be called to the matter before entering upon the trial, and an application made to postpone on that ground. Upon this subject we cannot add to what has already been said at the general term.

2. It is also urged that the court had no power to sentence the defendant, because the law which was in force at the time of the sentence was, as to the defendant, an *ex post facto* law.

The perjury is alleged in the indictment to have been committed ⁴⁰⁰ in 1891, at which time the statute provided that anyone convicted of perjury, in any case other than upon the trial of an indictment for a felony, should be punished for not less than two, nor more than ten, years. Before the trial the statute was amended (Laws of 1892, c. 662) by leaving out the minimum limitation of the term of imprisonment, so that the punishment might be imprisonment for a less, but could not be for a greater, term than under the statute thus amended.

A statute which permits the infliction of a lesser degree of the same kind of punishment than was permissible when the offense was committed, cannot be termed or regarded as an *ex post facto* law. The leading object in prohibiting the enact-

ment of such a law in this country was to create another barrier between the citizen and the exercise of arbitrary power by a legislative assembly. It was well understood by the framers of our federal constitution that the executive was not the only power in a government such as they were about to establish, which would require constitutional limitations. The possible tyranny by a majority of a representative assemblage was well understood and appreciated, and there were for that reason many provisions inserted in the constitution limiting the exercise of legislative power by the federal and also by state legislatures.

Bills of attainder and *ex post facto* laws had at that time a quite well-understood meaning. The former was a legislative judgment of conviction, an exercise of judicial power by parliament without a hearing and in disregard of the first principles of natural justice. Such bills had been passed in England, and the parties thereby condemned had been put to death. The *ex post facto* law was regarded as a law which provided for the infliction of punishment upon a person for an act done, which when it was committed was innocent: 1 Blackstone's Commentaries, 46. Enlarging upon this definition as being of the same species and coming within the same principle, a law which aggravated a crime and made it greater than it was when committed, or one which changed the punishment ⁴⁹¹ or inflicted a greater punishment than the law annexed to the crime when committed, or a law which changed the rules of evidence and received less or different testimony than was required at the time of the commission of the crime, in order to convict the offender, was included in the definition of an *ex post facto* law: *Calder v. Bull*, 3 Dall. 386, per Chase, J., at 390.

In the case just cited Mr. Justice Chase said that the restriction not to pass any *ex post facto* law, was to secure the person of the subject from injury or punishment in consequence of such law; that it was an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation. No act that mollified the rigor of the criminal law was regarded as an *ex post facto* law, but only a law that created or aggravated the crime, increased the punishment or changed the rules of evidence in order to secure conviction. The same view of the subject was taken by Denio, J., in *Hartung v. People*, 22 N. Y. 95, at 105. See, also, *Shepherd v. Peo-*

ple, 25 N. Y. 406. Nowhere is it suggested that legislative interference by way of mitigating the punishment of an offense could be regarded as an *ex post facto* law, if applicable to offenses committed before its passage. There is no reason for any such holding. It was never supposed that constitutional obstacles would be necessary in order to prevent the improper exercise of legislative clemency. There was little to fear from that quarter upon such a subject. Those who framed the constitution were not engaged in creating obstacles to be placed in the path of those legislators who desired by legislative enactment to exercise clemency towards offenders, nor were they anxious lest those who were intrusted with power should be disinclined to exercise it with sufficient sternness. Human experience had furnished them with no examples of danger from that direction, and their anxiety on that account cannot be discerned from a perusal of the federal constitution. In many if not in most cases the reasons for mitigating the severity of the punishment for any particular kind of ⁴⁹³ crime would apply with equal force to those cases in which the crime had been committed before, as well as to those in which the crime might be committed subsequent to, the enactment of the law, and we are aware of no policy which prevents such a construction of the constitutional provision as would permit that kind of a retrospective act. That it materially affects the punishment prescribed for a crime is not the true test of an *ex post facto* law. In regard to punishment it must affect the offender unfavorably before it can be thus determined. It seems to us plain that there can be no reason for any other view.

I do not think that the mere fact of an alteration in the manner of punishment, without reference to the question of mitigation, necessarily renders an act obnoxious to the constitutional provision. I know it is alluded to in the two cases in this state above cited, that of *Hartung v. People*, 22 N. Y. 95, and of *Shepherd v. People*, 25 N. Y. 406. In those cases the alteration was not merely in the manner. It was an alteration from capital punishment, to be inflicted in a certain manner and within a certain time after sentence was pronounced, to a punishment of a year's hard labor in state prison and then a possibility of capital punishment thereafter, at any time during the life of the criminal, at the pleasure of the governor for the time being, with imprisonment in the mean time at hard labor. As Judge Denio said:

"The sword is indefinitely suspended over his head, ready to fall at any time." It was said also by the same learned judge that it was not enough to say that most persons would probably prefer such a fate to the former capital sentence, because there were no means of knowing whether the one or the other punishment would be the most severe in a given case, as that would depend upon the disposition and temperament of the convict. I think that where a change is made in the manner of the punishment, if the change be of that nature which no sane man could by any possibility regard in any other light than that of a mitigation of punishment, the act would not be *ex post facto* where made applicable to offenses committed before its passage.

493 The present case does not involve the question, and it is only mentioned for the purpose of calling attention to it as one which has not yet been squarely decided in this court.

We have been referred to the case of *State v. Daley*, 29 Conn. 272, as holding the principle urged upon us by counsel for the defendant. A reference to the case shows that the court held that on account of the repeal of the statute before his trial, which was in existence when the crime was committed, the offender could not be punished because the statute which was passed to take its place applied only to cases which occurred subsequent to its passage. The decision was made with reference to the language used in the amending act, which the court held was clearly prospective, while the absolute repeal, in so many words, of the former act took away all right to use it for any purpose whatever. No fault can be found with the principle decided by the Connecticut court, but it has no application to this case. Precisely the same principle was decided in *Commonwealth v. Marshall*, 11 Pick. 350, 22 Am. Dec. 377.

In *Commonwealth v. Wyman*, 12 Cush. 237, the Massachusetts court held that the alteration of the punishment from that of death to imprisonment for life was not *ex post facto* when applied to offenses committed prior to the passage of the act. We have seen that in our own state such an alteration, under the peculiarities of our statute, was held to be an *ex post facto* law. I have seen no case where such an alteration as is disclosed by the act under discussion has been held to be an *ex post facto* law. In *Hartung v. People*, 22 N. Y. 95, the power of the legislature to remit any separable portion of the prescribed penalty was declared, and the very case of the

reduction in the term of imprisonment was cited as an instance of legislative power. We are clear there is no constitutional objection to the statute.

8. There were certain letters written to the defendant by his wife. These letters were offered by the people, and received in evidence under the objection of the defendant, and it is now urged that their admission was error for which a new ⁴⁹⁴ trial should be granted. The counsel for the defendant upon his trial had called the wife of defendant as a witness, and she had broken down in health before the examination was concluded, and became so ill that it was impossible to take her examination at the house. In order to obtain the benefit of her evidence in the case the defendant had to come to some understanding with the district attorney, or the testimony already given would have to go out, and nothing further could be admitted. Hence the stipulation as to the reading of all the evidence of the witness taken upon the former trial, subject to all legal objections. That meant the legal objections of the party against whom the testimony was given. When the defendant read the direct examination it was subject to the legal objections which the district attorney might make, and when the latter read the cross-examination it was subject to the legal objections thereto made by the counsel for the defendant; but each side was by the very terms of the stipulation to read the whole of the direct or cross-examination, as the case might be. The objection on this occasion was first made by defendant's counsel, who refused to read the particular portion of the direct examination, which, as the district attorney claimed, rendered some portions of the subsequent cross-examination (these particular letters included) admissible in evidence. The court, because of the stipulation, committed no error in compelling the reading of the evidence, and defendant's exception to that ruling is not good. Subsequently, when the district attorney offered the letters in evidence, the defendant's counsel objected to their introduction upon the ground that they were confidential communications from a wife to her husband and hence were inadmissible. Some expressions in one or two of the letters were undoubtedly contradictory of a portion of the testimony given by the witness upon the first trial. That particular portion of the wife's evidence the defendant had been compelled by the court to read. The people were entitled to the benefit of whatever contradiction there was. If

some of the letters contained nothing by way of contradiction, and hence might have been ⁴⁰⁵ claimed to be inadmissible for that reason, it is seen that there was no separate and distinct objection made to a particular letter that it contained no contradictory matter.

The objection of immateriality made by defendant was upon the ground that the letters only contradicted the witness upon an immaterial matter, viz., her belief as to the paternity of the child of the prosecutrix, Miss Keating, whether it was the child of the witness' husband or his brother's. We think the letters which contradicted the witness upon that question were properly received in evidence, and there was no separate objection taken to the others. Those which contradicted the witness might as evidence have some weight upon the question of her credibility, and the contradiction cannot be said to have been so plainly upon an immaterial matter as to have rendered the admission of the letters error on that ground. The further ground of objection to their admission was that they were confidential communications from a wife to her husband. The answer to this objection is that the letters, after they had been received by the defendant, were given by him to his mistress, the prosecutrix, Annie M. Keating, and she subsequently delivered them to the district attorney by whom they were offered in evidence. Comment upon the baseness of this act of the defendant is unnecessary. It speaks for itself. The result, however, is to release the letters from the operation of the rule as to confidential communications between husband and wife, and to leave them open to use as evidence to the same extent as if no such rule had ever guarded them. The rule which protects confidential communications of this nature was founded upon a wise public policy, adopted and pursued for the purpose of encouraging to the utmost that mutual confidence between husband and wife which is the strongest guaranty of a happy marriage. To this end the common law provided that all communications between husband and wife which were of a confidential nature should be kept inviolate, and should not be drawn from either party by any process of law: 1 Starkie on Evidence, 39; Greenleaf on Evidence, 14th ed., sec. 254. The law appreciated the fact that even ⁴⁰⁶ truth itself might be pursued too keenly and might cost too much. The general evil of infusing reserve and dissimulation between parties occupying such relations to each other,

would be too great a price to pay for the chance of obtaining and establishing the truth in regard to some matter under legal investigation: 1 Greenleaf on Evidence, sec. 240, note a, citing *Minet v. Morgan*, L. R. 8 Ch. 361. The case just cited related to confidential communications between attorney and client, but the principles are also applicable and with added force to communications between husband and wife.

If, however, the privilege have been once waived by the parties, it cannot be again invoked. It is personal, so that if one overhear such a communication he may testify to it, if it be otherwise admissible in evidence: *Commonwealth v. Griffin*, 110 Mass. 181; *State v. Center*, 35 Vt. 378, 386; *Rex v. Simons*, 6 Car. & P. 540; 25 Eng. Com. L. 565. And when the husband or wife, to whom a written confidential communication is addressed, makes it public by giving it to another, the confidential character of the communication as against such party has departed, and it may be treated like any other communication and put in evidence if otherwise admissible: *State v. Hoyt*, 47 Conn. 518, 540; 36 Am. Rep. 89; *State v. Buffington*, 20 Kan. 599, 613; 27 Am. Rep. 193.

In this case every reason upon which the rule rejecting a confidential communication was originally founded is absent. The letters were addressed by the wife to her husband, and he, deliberately violating every principle of honor and decency, gives the letters to his mistress, by whom they were delivered to the district attorney. A rule which would still preserve the confidential character of these letters as against this husband would be founded upon more sentiment than sense.

4. The charge of the learned judge in regard to the defendant not going on the stand as a witness was not subject to legal objection. The court told the jury that the defendant was not bound to go on the stand, and that he could say to the prosecution, "prove your case against me; it is my judgment that the situation is such that I am not bound to take the witness-stand, and the law gives me that right, and the law gives ⁴⁹⁷ me that privilege. I charge you that the law says there is no presumption to be taken against a defendant by reason of the fact that he does not take the witness-stand." The charge is criticised on the ground, as alleged, that the language which the judge put in the mouth of the defendant amounted to a covert insinuation that the situation was such that it would be disastrous to the defendant if he took the

stand. I think the criticism ill-founded. The jury were plainly instructed as to the law and the rights of the defendant. The insinuation suggested would be unwarranted from the language used. On the contrary, the natural interpretation would be that the defendant regarded the situation as one wholly lacking in proof of guilt, and he was under no obligation to go on the stand and explain what as yet required no explanation. The case of *Ruloff v. People*, 45 N. Y. 213, 222, is authority for the correctness of the course pursued by the learned judge.

5. The defendant's counsel complains also that one of the witnesses for defendant was committed to jail by the court in the presence of the jury, because of the character of his evidence given while on the stand as a witness.

This is not a question of legal error. The action of the court was within its power, and to be exercised within the sound discretion of the judge.

That it might have a bad effect upon the jury, and thereby prejudice the defendant's case, was one of the matters to be considered by the judge before making the order, but we do not think it was legal error to make the order under the circumstances.

We have carefully looked at and considered each and all the other grounds for a new trial which are set forth and discussed in the brief of the counsel for defendant, and we are quite clear that they do not show any errors committed to the prejudice of the defendant.

The judgment should be affirmed.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

EX POST FACTO LAWS.—By the Constitution of the United States it is declared that "no bill of attainder or *ex post facto* law shall be passed" (Const. of U. S., art. 1, sec. 9), and that no state shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts": Const. of U. S., art. 1, sec. 10. It is clear, therefore, that those provisions to be found in the constitutions of the majority of the states also forbidding the enactment of such laws are superfluities, and that, irrespective of these provisions, every such enactment in the United States, whether by the state or national legislature, is, in so far as it may be *ex post facto*, void. We have therefore no occasion to further consider the effect of such a law, and hence will devote this note wholly to the inquiry, what laws are *ex post facto* within the meaning of those words as used in the constitution of the United States?

Definitions.—It was at first contended that the prohibition of *ex post facto* laws applied to all retrospective laws, and that every retrospective law was

made void by the constitution of the United States; but this contention was overruled in the first case in which it was presented to the supreme court of the United States, and in delivering the opinion of that court Judge Chase formulated a definition of *ex post facto* laws, which has ever since been generally accepted as correct. The legislature of Connecticut had, by resolution, undertaken to set aside a decree of a court of probate, and to grant a new hearing before the same court, with a right of appeal, and this legislative action was assailed on the ground that it was *ex post facto*. It was, perhaps, sufficient for the court to have determined, as it did, that the constitutional provision relied upon related to criminal prosecutions merely; but the learned judge went further, and said: "I will state what laws I consider *ex post facto* laws, within the words and intent of the prohibition: 1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; 2. Every law that aggravates a crime, or makes it greater than it was, when committed; 3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. In my opinion the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law; the former only are prohibited. Every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement, as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law *ex post facto* within the prohibition that mollifies the rigor of the criminal law; but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to excuse acts which were unlawful and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful and the making an innocent action criminal, and punishing it as a crime": *Calder v. Bull*, 3 Dall. 386, 390; *Carpenter v. Commonwealth*, 17 How. 456. The fourth specification, including within *ex post facto* laws all those enactments which alter the legal rules of evidence, and receive less or different testimony than the law required at the time of the commission of the offense, has been, and to some extent still is, the subject of controversy. That part of the definition is, however, still quoted by the supreme court of the United States with apparent approval: *Kring v. Missouri*, 107 U. S. 232; *Cummings v. State*, 4 Wall. 277; and, we think, is secure from all successful assault. Subsequent decisions formulating or adopting definitions of *ex post facto* laws have almost universally followed the definitions thus given in the earliest case in the supreme court of the United States: *Lindsey v. State*, 65 Miss. 542; 7 Am. St. Rep. 674; *Boston v. Cummins*, 16 Ga. 102; 60 Am. Dec. 717; *Ex parte Garland*, 4 Wall. 391; *Cummings v. Missouri*, 4

Wall. 326; *Fletcher v. Peck*, 6 Cranch, 138; *Gut v. State*, 9 Wall. 35; *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433; 98 Am. Dec. 237; *Baughner v. Nelson*, 9 Gill. 299; 52 Am. Dec. 694. Our further consideration of this subject is merely for the purpose of giving illustrations of the applications of those definitions which have been made in the various courts of the country, state or national.

Civil Rights and Proceedings.—No court or writer now dissents from the proposition that the constitutional inhibition under discussion applies only to crimes and criminal prosecutions; or, more accurately speaking, to the inflicting of punishment for pre-existing acts. Therefore, if a legislative attempt to deprive a person of property rights of any character may be avoided because prohibited by the fundamental law of the state or nation, such prohibition must be found elsewhere than in the prohibition against *ex post facto* laws: *In re Sawyer*, 124 U. S. 200, 219; *Ex parte Garland*, 4 Wall. 390; *Boston v. Cummins*, 16 Ga. 102; 60 Am. Dec. 717; *Baughner v. Nelson*, 9 Gill. 299; 52 Am. Dec. 694; *Locke v. New Orleans*, 4 Wall. 172. Hence a law will not be declared void as *ex post facto* legislation because it attempts to revive a right of appeal (*Henderson etc. R. R. v. Dickerson*, 17 B. Mon. 173; 56 Am. Dec. 148), or to divest vested rights by curing irregularities and defects in civil proceedings (*Grim v. Weissenberg School Dist.*, 57 Pa. St. 433; 98 Am. Dec. 237), such as acknowledgments of deeds (*Watson v. Mercer*, 8 Pet. 88, 109), or to confirm judicial proceedings (*Locke v. Dane*, 9 Mass. 360), or to deprive an attorney of the right to practice law where such deprivation is not by way of punishment for a past offense (*Bryne's Ad. v. Stewart's Ad.*, 3 Desaus. 466, 477; *Ex parte Garland*, 4 Wall. 333). Retrospective laws are often invalid because in violation of some constitutional provision other than the one here under consideration; but they are never invalid merely because *ex post facto* unless they apply to crimes or criminal prosecutions: *Municipality etc. v. Wheeler*, 10 La. Ann. 745; *Aldridge v. Tusculum etc. Ry.*, 2 Stew. & P. 199; 23 Am. Dec. 307; *State v. Paul*, 5 R. L. 190; *Bridgeport v. Hubbell*, 5 Conn. 240; *Wilder v. Lumpkin*, 4 Ga. 208; *Perry v. Commonwealth*, 3 Gratt. 632.

Acts Innocent When Done.—That a statute making an act which, when done, was innocent and not subject to any punishment, criminal, and authorizing the infliction of punishment for its commission is *ex post facto* and void, no one will deny. The proposition is so clear that there has been little necessity to consider it judicially, and, when considered, the only question before the court has been whether or not an act not punishable when committed has been made punishable by a statute subsequently enacted. A law may, it seems, be *ex post facto*, though it applies only to acts committed after its enactment, if its construction is such that it may make an act which, when committed, is not criminal or punishable, punishable upon the happening of some future contingency for which the actor is not responsible. Thus section 5132 of the Revised Statutes of the United States declared that every person respecting whom proceedings in bankruptcy are commenced, who within three months before their commencement and under false color and pretense of carrying on business, obtained on credit from any other person any goods or chattels with intent to defraud, should be punishable as in the statute prescribed. Under this section, if valid, it might happen that a person, though he obtained goods in the manner denounced in the act, was then guilty of no crime whatever, but upon a creditor subsequently filing a petition against him and procuring a decree adjudging him to be a bankrupt, the debtor thereby became punishable without any further act on

his part, though the act in so far as the debtor participated in it was not criminal nor punishable. The section was declared unconstitutional, the court saying: "Upon principle, an act which is not an offense at the time it is committed cannot become such by any subsequent independent act of the party with which it has connection. By the clause in question, the obtaining of goods on credit upon false pretenses is made an offense against the United States, upon the happening of a subsequent event, not perhaps in the contemplation of the party, and which may be brought about, against his will, by the agency of another. The criminal intent essential to the commission of a public offense must exist when the act complained of is done; it cannot be imputed to a party from a subsequent independent transaction. There are cases, it is true, where a series of acts are necessary to constitute an offense, one act being auxiliary to another in carrying out the criminal design. But the present is not a case of that kind. Here an act which may have no relation to proceedings in bankruptcy becomes criminal, according as such proceedings may or may not be subsequently taken, either by the party or by another": *United States v. Fox*, 95 U. S. 670. If a statute endeavors by retroactive operation to reach acts before committed and also provides a like punishment for the same acts in future, it is not wholly void but is valid as to future cases within the legislative control: *Jackson v. New York*, 128 U. S. 189.

Amendatory Statutes.—If an act is criminal and punishable when committed, and a statute is subsequently enacted also making it criminal and punishable, but giving the crime a designation not before given to it, the situation of the accused is not altered to his disadvantage, and hence it cannot be said that there has been any *ex post facto* legislation, nor does the new or amendatory statute obliterate the pre-existing law so that a conviction and punishment after its enactment and the consequent repeal of the former statute can be regarded as a conviction and punishment of an act not criminal when committed. "Principle forbids the conclusion that an amendatory statute defining an offense in substantially the same language as that employed in the statute it amends, takes away the right of the state to prosecute the offender, and requires his unconditional discharge. It cannot be logically affirmed when the same offense is defined in the same way by both the earlier and the later statute, that there is an interregnum in which there was no law defining the offense. The two acts interpose and blend so fully and compactly that it is impossible that there can be an interval when there was no law. Between the two acts there is no period of intervening time in which no offense existed. The duration of the statute was unbroken and continuous, and the crime one and the same. The amendatory act creates no new offense, nor does it absolve an offender from one previously committed; it simply re-enacts the earlier statute, so that the offense is the same under the one act as under the other. If a new offense had been defined, or new elements added to the crime as defined in the first statute, there would be force in the position that the offense defined by the earlier act had ceased to exist, but where the offense remains unchanged from first to last, there is no plausibility in the argument, that when the amendatory statute took effect, the crime ceased to exist. There can be no plausibility in such an argument, for the plain reason that there was no interval when the crime was not punishable, inasmuch as there was not an instant of time when there was not a law defining and denouncing it. The succession of the statute was unbroken and the reign of law uninterrupted": *Sage v. State*, 127 Ind. 15; *State v. Wish*, 15 Neb. 448; *State v. Baldwin*, 45

Conn. 134; *State v. Sutton*, 100 N. C. 474; *Powers v. Shepard*, 48 N. Y. 540; *Alexander v. State*, 9 Ind. 337; *Commonwealth v. Sullivan*, 150 Mass. 315; *Randolph v. Larned*, 27 N. J. Eq. 557.

Revival of Repealed Statutes.—Whether the rule of law that the repeal of a repealing statute revives the original statute can be applied to criminal prosecutions without giving effect to *ex post facto* legislation, is a question rarely considered and not yet definitely settled. Early decisions in the state of Massachusetts undoubtedly sanction the punishment of an offender according to a statute in force when his offense was committed, though such statute had afterwards been entirely repealed but was revived by a third statute repealing the second, and thus, as the court held, bringing the first act again into operation: *Commonwealth v. Getchell*, 16 Pick. 452; *Commonwealth v. Mott*, 21 Pick. 492. While these cases have not, so far as we are aware, ever been overruled, nor do we know of any decision not possible to be reconciled with them, still we are inclined to the opinion that whenever they shall be necessarily called in question, they will not be upheld; *State v. Keith*, 63 N. C. 140; *Hartung v. People*, 22 N. Y. 95.

Removing the Defense of the Statute of Limitations.—The time within which an offense may be prosecuted is limited by statutes in many of the states. The legislature may repeal or modify these statutes of limitation from time to time, and then the inquiry arises whether there is a revival of the right to prosecute an offender who, before such repeal, could not have been subjected to any further punishment. That in the absence of clear language a law enlarging the time within which a prosecution may be commenced will not be applied retroactively is, we think, admitted, because it is a general rule of construction that statutes shall not be deemed to operate retroactively unless the legislative will to that effect is clearly expressed; *State v. Sneed*, 25 Tex. Supp. 66; *People v. Lord*, 12 Hun, 282. We shall hereafter see that the prohibition of *ex post facto* laws does not impair the power of the legislature to regulate the remedies by which persons alleged to be guilty of crime may be accused and tried, and it has been insisted that the statute of limitations applicable to criminal prosecutions is but a part of the remedy and therefore subject to the legislative will, and further that no one can secure a vested right not to be punished for an act criminal and punishable by the laws of his country at the time when he committed it. It is also true in civil cases that the legislature has a general power to regulate and change the remedies by which persons may seek redress for civil wrongs or for the enforcement of civil rights, but there is now no doubt that, if the party has by the operation of the statute of limitations lost all means of redress in the courts, the legislature cannot repeal such statutes or otherwise revive his right of action and authorize him to enforce it by suit. The sounder view, in our judgment, is that, an accused when, through the operation of the statute of limitations he has secured immunity from any criminal prosecution, cannot have such immunity destroyed by subsequent legislative action: *Moore v. State*, 43 N. J. L. 203; 39 Am. Rep. 558, reversing *State v. Moore*, 42 N. J. L. 206. In many of the cases the test applied to the determination of the question whether a statute is *ex post facto*, has been to inquire whether such statute altered the situation of the accused to his disadvantage, and we know of no case in which a criminal statute has been allowed a retroactive operation, to his detriment. The application of this test to an act removing the defense of the statute of limitations necessarily, in our judgment, precludes the application of such

act so as to sustain a conviction of one who at any time possessed a perfect defense against his prosecution.

Aggravating a Crime or Changing the Penalty.—The second and third specifications or illustrations in the definition of Judge Chase must, for all practical purposes, be regarded as expressing the same idea. The law cannot aggravate a crime and make it greater than when committed, without at the same time inflicting a greater punishment than was permissible when it was committed. Hence we apprehend that a statute merely changing the name or rank of a crime, even though such change make it seem more heinous than before, will not make such statute *ex post facto*, though applicable to past crimes, if the consequences to the offenders are precisely the same as under the pre-existing law. That increasing the penalty to be suffered by one guilty of a crime before the enactment of the statute is *ex post facto* there can be no doubt: *In re Medley*, 134 U. S. 160; *Dickinson v. Dickinson*, 3 Murph. 327; 9 Am. Dec. 608. The real difficulty is in determining whether a change made by the statute does increase such penalty or not. Perhaps it is true that if there is any change in the nature of the punishment, the courts will not undertake to determine whether such change increases or aggravates it or not, but will treat every change in the manner of the punishment as forbidden by the constitution. Thus Chief Justice Marshall, in *Fletcher v. Peck*, 6 Cranch, 133, said: "An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed." The point, however, was not involved in the case in which this language was employed. The same idea is, however, expressed in other decisions: *Hartung v. People*, 26 N. Y. 167; 22 N. Y. 104; *State v. McDonald*, 20 Minn. 136; and the apparently unanswerable suggestion is made that if any other test than that of change in the manner of punishment is adopted, the courts are required, as between punishments of different natures, to determine which is the more severe: *Shepherd v. People*, 25 N. Y. 415. There are doubtless several decisions in which the courts appear to have acted upon a sort of judicial knowledge that one punishment was in mitigation of another, though they were of different characters: *Turner v. State*, 40 Ala. 28; as that imprisonment for life or for some less term was in mitigation of the death penalty: *Commonwealth v. Gardner*, 11 Gray, 438. In North Carolina it was held that a statute changing the punishment to confinement in the penitentiary from whipping and imprisonment in the common jail was, by way of mitigation, and therefore applicable to past offenses, and it was said that "The rule is not that the punishment cannot be changed, but that it cannot be aggravated": *State v. Kent*, 65 N. C. 312; *State v. Ratts*, 63 N. C. 503; and in an early case in Indiana it was held that a change in punishment from whipping not exceeding one hundred stripes to imprisonment not exceeding seven years, was also by way of mitigation: *Strong v. State*, 1 Blackf. 193. The courts all agree that a statute mitigating the punishment for a crime is not prohibited, and the punishment as thus mitigated may be inflicted upon past offenders; *McInturf v. State*, 20 Tex. App. 335; *Lindzey v. State*, 65 Miss. 542; 7 Am. St. Rep. 674; *People v. Hayes*, 140 N. Y. 484; *ante*, p. 572; but we apprehend that no change in the penalty attached to a crime can be regarded as in mitigation merely, because the courts, or even the great mass of mankind, would prefer suffering the penalty as changed to suffering the penalty prescribed when the crime was committed. "As the constitutional provision was enacted for protection against arbitrary and oppressive legislation, it is quite evident that it is not violated by any change in the law which goes in mitigation of the punishment. There has been

much diversity of opinion as to what would constitute mitigation of punishment in such a case, but the view best sustained by reason and authority is, that a law changing the punishment of offenses committed before its passage is objectionable as being *ex post facto*, unless the change consists in the remission of some separable part of the punishment before prescribed, or is referable to prison discipline or administration as its primary object: Cooley's Constitutional Limitations, 329. It is enough for courts to render judgment according to law without being required to determine the relative severity of different punishments, when there is no common standard in the matter by which the mind can be satisfactorily guided. "If the law," says Judge Cooley, "makes the fine less in amount or imprisonment shorter in point of duration, or relieves it of some oppressive incident, or if it dispenses with some separable portion of the legal penalty, no embarrassment would be experienced in reaching a conclusion that the law was favorable to the accused, and therefore not *ex post facto*. But who shall say, when the nature of the punishment is altogether changed, that the punishment is diminished or increased by the change? What test of severity does the law or reason furnish in these cases? And must the judge decide upon his own view of the pain, loss, ignominy, and collateral consequences usually attending the punishment, or may he take into view the peculiar condition of the accused, and upon that determine whether, in his particular case, the punishment prescribed by the new law is or is not more severe than under the old law?": Cooley's Constitutional Limitations, 324; *Lindsey v. State*, 65 Miss. 542; 7 Am. St. Rep. 674; *Hartung v. People*, 22 N. Y. 95. Hence it was held that an act punishable by imprisonment when committed could not, by a subsequent statute, be made punishable by fine or imprisonment: *State v. McDonald*, 20 Minn. 136; and we doubt whether any court will ever again undertake to determine that one kind of punishment is in mitigation of another, except when the punishment prescribed by the two statutes is of the same character, as where both prescribe a fine or both an imprisonment, and the subsequent statute prescribes a less fine in the one case or a shorter imprisonment in the other. If the punishment prescribed by a statute enacted after the commission of a crime is such that it may be in aggravation of the punishment, then it is *ex post facto*, nor is it material that it may be within the discretion of the court or jury to inflict a less punishment if it is equally within their discretion to inflict a greater than was before authorized: *Wilson v. Ohio etc. R. R. Co.*, 64 Ill. 542; 16 Am. Rep. 565; *Beard v. State*, 74 Md. 130; *In re Medley*, 134 U. S. 160. Therefore a statute is unconstitutional which prescribes that a person condemned to death shall submit to solitary confinement from the passing of his sentence until the date of his execution, in so far as such statute is applicable to pre-existing criminal acts, though the statute may further contemplate that some public officer may elect to suffer the criminal to remain in such imprisonment, and thereby to escape the death penalty altogether: *Ex parte Medley*, 134 U. S. 160. *Contra: In re Tyson*, 13 Col. 432.

If, after a crime is committed, a statute is enacted imposing a punishment in aggravation of that previously applicable, and such statute, in effect, supplants or repeals the pre-existing law, then the criminal cannot be punished at all. His punishment under the first statute is impossible because it is no longer in existence, and punishment under the second statute is equally impossible because it cannot be applied to pre-existing offenses without falling within the constitutional prohibition against *ex post facto* laws: *Commonwealth v. McDonough*, 13 Allen, 581; *Hartung v. People*, 22 N. Y. 95; 26

N. Y. 167; *Shepherd v. People*, 25 N. Y. 406; *In re Petty*, 22 Kan. 477; *Kring v. Missouri*, 107 U. S. 221, 226; *State v. Meader*, 62 Vt. 453.

Second Offenses.—As we shall hereafter see, there are numerous decisions to the effect that *ex post facto* statutes will not be permitted to alter the situation of the accused to his prejudice. Some of these decisions refer to the manner or extent of his punishment, and others to the mode of trial, or to the taking away of privileges or defenses to which he was entitled when the offense of which he is accused was committed. We shall hereafter refer to certain matters which seem to effect his punishment, but which have, for various reasons, been adjudged not to be, in contemplation of law, a part of such punishment so as to come within the constitutional provision against *ex post facto* laws. Thus a person convicted of a crime may, for the purpose of deterring him from continuing his career as a criminal, be subjected to a more severe punishment for a future offense than if he had not been before convicted, and a statute increasing the punishment for his second offense may be enacted after the first offense was committed and a judgment of conviction therefor entered. The true ground upon which these statutes are sustained is, that the punishment is awarded for the second offense only, and that in determining the amount or nature of the penalty to be inflicted, the legislature may require the courts to take into consideration the persistence of the defendant in his criminal course. At all events, statutes of this character have been sustained in every instance in which they have been assailed: *Ex parte Gutierrez*, 45 Cal. 430; *Rand v. Commonwealth*, 9 Gratt. 738; *Ross' Case*, 2 Pick. 165. In justifying and sustaining a statute of the character here under consideration, it was said: "The statute relates to the judgment to be rendered and the sentence to be imposed in cases arising after it goes into effect. It is prospective and not retrospective. It deals with offenders for offenses committed after its passage, but it provides that, in considering the nature of an offense and the condition into which the offender is brought by it, his previous conduct may be regarded. The meaning of the statute in this particular seems clear, and we have no doubt that it is applicable to the case before us. With this construction it is not unconstitutional as an *ex post facto* law. In punishing offenses committed after its passage, it punishes the offenders for a criminal habit whose existence cannot be proved without showing their voluntary criminal act done after they are presumed to have had knowledge of the statute. Such an act is a manifestation of the habit, which tends to establish and confirm it, and for which the wrongdoer may well be held responsible. That statutes of this kind are constitutional is settled by well-considered adjudications of this court": *Commonwealth v. Graves*, 155 Mass. 163; *Sturtevant v. Commonwealth*, 158 Mass. 598. If, however, the second offense is committed before the enactment of the statute providing the additional punishment for persons who have twice been previously found guilty, such statute cannot be enforced for such offense, because it could not be applied without inflicting a punishment not authorized when the second criminal act was committed: *Riley's Case*, 2 Pick. 172.

If the statute under which a conviction was had authorizes as part of the punishment the imprisonment of the defendant and the compelling him to labor, the state has absolute control over the place of his confinement and the manner in which he shall be employed or made to labor, provided always that he is not subjected to unusual or cruel punishment prohibited by the constitution. Laws may therefore be passed, even after he is convicted, authorizing him to be leased or hired out to work for private persons, if during

such leasing, he is still under the control of the state authorities and not subjected to labor or punishment to which they could not rightfully have subjected him. Though in the absence of such statute he might have remained in idleness for want of work to be done, it does not, in contemplation of law, increase his punishment: *Mason etc. Co. v. Main Jellico etc. Co.*, 87 Ky. 487; *State v. McCauley*, 15 Cal. 456.

What Is a Punishment.—One of the most embarrassing questions in connection with *ex post facto* legislation is determining whether that to which a person is subjected by a law approved after the commission of an act and as a consequence thereof must be regarded as a punishment of it, for there are many conceivable instances in which a party may suffer on account of a crime committed by him in which his so suffering must be regarded not in the nature of a punishment, but as a safeguard adopted for the protection of society and the good of the commonwealth, and with reference to statutes from which he so suffers, it may often be difficult to determine whether or not their object is the punishment of an offense in a manner in which it was not previously punishable by any law. If such be the object, it must be conceded that the statute cannot be allowed any *ex post facto* operation. Thus, though by law, when an embezzlement or larceny was committed, the only punishment was imprisonment for a stated period, the legislature can hardly be regarded as prohibited from protecting and securing the public interests by excluding from positions of public trust persons convicted of those offenses, as by making them ineligible to the offices of administrators, guardians, trustees, and the like, in which their beneficiaries might probably be more apt to suffer than if their interests were intrusted to persons not known to be guilty of crime.

In determining the qualifications of voters, the legislature may, we think, exclude persons whose criminal character has been established by their conviction of crime, though when their crimes were committed such commission did not involve their exclusion from the right to exercise the elective franchise, but as this franchise in the absence of a constitutional provision conferring it, is a mere privilege to be granted or withheld as the law-making power may deem best and may be withheld from persons innocent of crime, because of sex or of any other reason that may appeal with success to the law-makers: *Murphy v. Ramsey*, 114 U. S. 43; *Shepherd v. Grinnett*, 2 Idaho, 1123, it may obviously be withheld from persons guilty of crime without being regarded as an infliction of a punishment prohibited by the constitution: *Washington v. State*, 75 Ala. 582; 51 Am. Rep. 479; and they may be required as a proof of their fitness to exercise this franchise to take an oath prescribed by the legislature showing that they have not been guilty of any acts or practices forbidden to voters: *Shepherd v. Grinnett*, 2 Idaho, 1123; *Wooley v. Watkins*, 2 Idaho, 555. If, on the other hand, the right to exercise the elective franchise has been conferred by the constitution on any person, it cannot be taken away by the legislature, nor can it prescribe an oath or test to be taken by a voter or applied to or against him not warranted by the constitution: *Green v. Shumway*, 39 N. Y. 418.

In those cases in which the person against whom a statute is sought to be enforced had previous to its enactment the right to do some act, exercise some privilege, pursue some calling, or interpose some defense to a proceeding against him, whether civil or criminal, and the statute seeks to exclude him from the right to do the act, exercise the privilege, pursue the calling, or make the defense because of something done by him and thus alters his situation to his prejudice, such statute inflicts a punishment and therefore

cannot be permitted an *ex post facto* operation. Thus if a nonresident defendant against whom a judgment has been entered is by a statute given the right on his return to the state and within a time specified to appear in the action and make his defense as if he had appeared before judgment, he cannot by a subsequent statute as a condition precedent to his so appearing and defending, be required to take an oath that he has not voluntarily borne arms against the United States: *Pierce v. Carshadon*, 16 Wall. 234. The leading cases upon this subject are *Cummings v. Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333. In the first of these cases Rev. Mr. Cummings, a Roman Catholic priest, had been indicted and convicted in the state of Missouri of the crime of teaching and preaching without having first taken an oath prescribed by the constitution of the state, to the effect that he had been truly loyal to the United States, and that he had not done any acts prohibited by the third section of the second article of the constitution of the state. Among the acts prohibited by this section were being in armed hostility to the United States or to the lawful authorities thereof, manifesting adherence to the cause of its enemies or a desire for their triumph, sympathizing with persons engaged in exciting or carrying on rebellion, knowingly or willfully harboring, aiding, or countenancing any person engaged in the rebellion, or in avoiding the enrollment of persons in the military service, or in any other way indicating his disaffection to the government of the United States. The section declared that anyone guilty of these acts should not be capable of holding any office in the state of honor, trust, or profit, and should not act as a professor or teacher in any educational institution or common school, or hold any real estate or other property in trust for the use of any church, religious society, or congregation. The seventh section of the same article required every person holding any office of honor, trust, or profit, or exercising any of the offices, positions, or trusts mentioned in the third section to take and subscribe the oath of loyalty prescribed by section six; and by section fourteen all persons exercising any office, position of trust, profession, or function hereinbefore specified, without having taken, subscribed, and filed such oath of loyalty, should, on conviction, be punished by a fine of not less than five hundred dollars or imprisonment in the county jail. It was insisted in support of the conviction of Cummings that the constitution in question did not punish past offenses, but only prescribed qualifications for the exercise of offices and positions of trust, but the supreme court of the United States decided otherwise, and upon this subject said, "Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession. Webster defines the term to mean 'any natural endowment or any acquirement which fits a person for a place, office, or employment, or enables him to sustain any character, with success.' It is evident from the nature of the pursuits and professions of the parties placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions. There can be no connection between the fact that Mr. Cummings entered or left the state of Missouri to avoid enrollment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the rebellion constitute any evidence of the unfitness of the attorney or counselor to practice his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or

business capacity in the manager of a corporation, or in any director or trustee. It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties who had committed them of some of the rights and privileges of the citizen. The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is not punishment at all.' The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as executor, administrator, or guardian, may also, and often has been, imposed as punishment. By statutes 9 and 10, William III, chapter 32, if any person educated in, or having made a profession of, the Christian religion, did, "by writing, printing, teaching, or advised speaking," deny the truth of the religion, or the divine authority of the scriptures, he was for the first offense rendered incapable to hold any office or place of trust; and for the second he was rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, besides being subjected to three years' imprisonment without bail."

The case of *Ex parte Garland*, 4 Wall. 333, was one in which an application was made to be permitted to continue practice as an attorney in the national courts without taking the oath prescribed by an act of Congress passed in 1865, requiring each person before being allowed to practice in those courts to take an oath that he had not voluntarily borne arms against the United States, given aid, encouragement, or counsel to persons engaged in armed hostility thereto, nor sought, accepted, nor attempted to exercise the functions of any office under authority, or pretended authority, in hostility to the United States, nor yielded a voluntary support to any government or constitution within the United States hostile thereto. It was admitted that the applicant had borne arms against the United States and exercised offices under authority in hostility thereto, and that he had been pardoned by the President of the United States for all offenses committed for his participation, direct or indirect, in the rebellion. The question before the court then was whether prohibiting him to continue to practice as an attorney in the national courts was an infliction of punishment upon him within the

meaning of the prohibition in the national constitution against *ex post facto* legislation. In determining that the statute inflicted punishment for acts perpetrated before its enactment, and was therefore invalid, the court said: "The statute is directed against parties who have offended in any of the particulars embraced by these clauses, and its object is to exclude them from the profession of law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as a punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included." The court, however, conceded the right of the legislature to prescribe qualifications for office, in the following language: "The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the constitution. That this result cannot be effected indirectly by a state under the form of creating qualifications we have held in the case of *Owens v. Missouri*, 4 Wall. 277, and the reason by which that conclusion was reached applies equally to similar action on the part of Congress."

The marital relation is not regarded as resting upon contract, nor is the granting of a divorce or creating a cause therefor treated as in punishment for a crime. The legislature, therefore, is not restrained, either by the prohibition against the enactment of laws impairing the obligation of contracts, or against the passage of *ex post facto* laws, from granting divorces by special acts for such causes as to it shall seem proper: *Maynard v. Hill*, 125 U. S. 196; *Maynard v. Valentine*, 2 Wash. (Ter.) 3; Cooley's Constitutional Limitations, 4th ed., 122; note to *Gaines v. Gaines' Exr.*, 48 Am. Dec. 437; *Starr v. Pease*, 8 Conn. 541. It may also at any time provide what shall be a cause of divorce, and such cause may be applied to marriages already contracted or to offenses already committed (*Carson v. Carson*, 40 Miss. 349), and may consist of acts not criminal or wrongful in themselves, such as the misfortune of one of the spouses in becoming insane or of weak mind: *Hickman v. Hickman*, 1 Wash. 257; 22 Am. St. Rep. 148. The theory of these decisions is that in granting a divorce, or providing a cause for which the courts may grant it, the legislature does not necessarily punish a crime or a wrongful or immoral act, but merely, in the interests of society, provides the conditions in which it shall not be necessary for the spouses to continue in the marriage status or relation.

The general statement is made in many of the decisions of the national and other courts, and therefore must be taken to be true, that every law is *ex post facto* "which in relation to an offense or its consequences alters the situation of the party to his disadvantage": *United States v. Hall*, 2 Wash. C. C. 336; *Kring v. Missouri*, 107 U. S. 223; *Garvey v. People*, 6 Col. 559; 45 Am. Rep. 531. Therefore, because they altered the situation of the accused persons to their disadvantage, the following statutes were declared inapplicable

to offenders whose crimes were committed before their enactment: A statute depriving a person against whom sentence had been pronounced on a plea of guilty of murder in the second degree of his immunity from prosecution for murder in the first degree: *Kring v. Missouri*, 107 U. S. 221; a statute repealing a statute enabling every person accused of murder to avoid the risk of capital punishment by entering a plea of guilty: *Garvey v. People*, 6 Col. 559; 45 Am. Rep. 531; repealing a general amnesty act, and attempting to deprive certain classes of criminals of the benefit of their pardon for previous offenses: *State v. Keith*, 63 N. C. 140; a statute requiring a person in a suit or proceeding against him under the revenue laws of the United States to produce his books, invoices, and papers, and to permit their examination and use against him as evidence, and in default of his producing them, taking as confessed by him the matters alleged to be in such books, invoices, or papers: *United States v. Hughes*, 8 Ben. 29; a statute taking away the power of the jury to determine whether one pronounced guilty of murder in the first degree should be punished either by death or imprisonment for life, and requiring the punishment in all cases of conviction of murder in the first degree to be the infliction of the death penalty: *Marion v. State*, 16 Neb. 349; a statute purporting to legalize judicial proceedings otherwise invalid for the purpose of sustaining convictions previously entered: *In re Murphy*, 1 Woolw. 141.

Changing Rules of Evidence.—That the situation of an accused may be altered to his disadvantage either by excluding evidence in his behalf which was admissible at the time of the alleged commission of his offense, or by admitting evidence against him which was inadmissible at such time, appears to be incontrovertible. Hence we find in the leading case upon the subject, in the enumeration of *ex post facto* laws, "Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense to convict the offender"; *Calder v. Bull*, 3 Dall. 390. This language has never been repudiated. On the other hand it has never been applied to any case, and we have no means of ascertaining what changes in the rules of evidence are inapplicable to the trial of accusations for pre-existing offenses. Certain it is that persons may be permitted to testify who were incompetent as witnesses when the crime was committed. "Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree or lessen the amount or measure of proof which was made necessary to conviction when the crime was committed": *Hopt v. Utah*, 110 U. S. 574; *Robinson v. State*, 84 Ind. 452. Therefore in a prosecution for seduction, the female alleged to have been seduced may be permitted to testify, though not competent when the offense was perpetrated, if made competent by a statute thereafter and before the trial enacted: *Mross v. State*, 31 Tex. Crim. App. 597; *post*, p. 834.

Changes in Procedure.—The changes in the law of evidence respecting the competency of witnesses referred to above were sustained on the ground that they related to the remedy and were merely a part of the criminal procedure which the legislature has authority to alter from time to time and in altering is not deemed to infringe the constitutional prohibition against *ex post facto* laws. All the courts, state and national, agree that a change in

criminal procedure is not to be regarded as altering the situation of an accused to his disadvantage. Probably no precise test can be formulated by which to determine whether a change in the criminal law relates to procedure only and may operate retrospectively, or to the crime and its consequences, and may not operate otherwise than prospectively. The following are instances of statutory changes which have been held to affect the remedy or procedure only: Changing the place of trial from one county to another: *Gut v. State*, 9 Wall. 35; *Cook v. United States*, 138 U. S. 157, 183; providing a time of day in which the death penalty shall be inflicted, and prescribing regulations limiting the number of persons who may witness its infliction: *Holden v. Minnesota*, 137 U. S. 483; restricting the number of peremptory challenges to which the defendant is entitled: *South v. State*, 86 Ala. 617; *State v. Ryan*, 13 Minn. 370; requiring the defense of insanity to be specially pleaded in criminal prosecutions: *Perry v. State*, 87 Ala. 30; allowing the counsel for the prosecution to close, as well as to commence, the argument to the jury: *People v. Mortimer*, 46 Cal. 114; creating a new court or conferring new jurisdiction, or enlarging or diminishing the powers of existing courts: *Anderson v. O'Donnell*, 29 S. C. 355; 13 Am. St. Rep. 728; *State v. Sullivan*, 14 Rich. 281; *Commonwealth v. Phillips*, 11 Pick. 28; transferring jurisdiction from one court to another: *State v. Welch*, 65 Vt. 50; *State v. Cooley*, 30 S. C. 105; reducing the number of grand jurors required to find an indictment: *State v. Al Jim*, 9 Mont. 167; authorizing prosecutions for crime to be upon information as well as upon indictment: *People v. Campbell*, 59 Cal. 243; 43 Am. Rep. 257; *Lybarger v. State*, 2 Wash. 552; *In re Wright*, 3 Wyo. 478; 31 Am. St. Rep. 94; *Contra: State v. Kingsly*, 10 Mont. 537; making the jurors judges of the facts alone, instead of permitting them to be judges both of the law and of the facts: *Marion v. State*, 20 Neb. 233; 57 Am. Rep. 825. Nor will the fact that a change in the remedy may result in the accused being subjected to greater costs prevent the operation of the statute against pre-existing offenses. "The costs of a prosecution are only incidents of it, and in every case are more or less dependent on a variety of causes and incidents connected with or growing out of each case. The mere fact that the expense of the trial is greater in one court, or in one county or district, than in another, does not make a statute providing for a trial of the respondent for an offense existing at its passage in such other court, county, or district, an *ex post facto* law": *State v. Welch*, 65 Vt. 50. The general authority of the legislature over the procedure in criminal prosecutions is thus summarized by Judge Cooley in his work on Constitutional Limitations." But so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the court, in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime. Statutes giving the government additional challenges (*Walston v. Commonwealth*, 16 B. Mon. 15; *Jones v. State*, 1 Ga. 610; *Warren v. Commonwealth*, 37 Pa. St. 45; *Waller v. People*, 32 N. Y. 147; *State v. Ryan*, 13 Minn. 370; *State v. Wilson*, 48 N. H. 398; *Commonwealth v. Dorsey*, 103 Mass. 412), and

others which authorized the amendment of indictments, have been sustained and applied to past transactions, as doubtless would be any similar statute, calculated merely to improve the remedy, and in its operation working no injustice to the defendant, and depriving him of no substantial right": Cooley's Constitutional Limitations, p. 331, 4th ed.; *In re Wright*, 3 Wyo. 478; 31 Am. St. Rep. 98.

HUSBAND AND WIFE.—WHEN LETTERS BETWEEN ARE NOT PRIVILEGED COMMUNICATIONS: See the extended note to *Commonwealth v. Sapp*, 29 Am. St. Rep. 416-418.

ATTAINER.—For a discussion of the English laws concerning, see the extended note to *Avery v. Everett*, 6 Am. St. Rep. 380.

PHILLIPS v. MERCANTILE NATIONAL BANK.

[140 NEW YORK, 550.]

BANKS AND BANKING.—A check drawn in the name of a real person who has no knowledge, and is not intended to have any knowledge, thereof, or any interest therein, is equivalent, in legal effect, to a check drawn in favor of a fictitious person.

BANKS AND BANKING.—If a cashier draws checks in favor of customers of the bank, but without their knowledge, and without intending them to have any interest therein, and then forges their indorsements and delivers the checks to third persons to be collected for his benefit, the bank is answerable for the act of its cashier, and liable for the checks thus drawn by him.

George W. Wingate, for the appellant.

Charles A. Davison, for the respondent.

550 GRAY, J. The plaintiff is the receiver of the National Bank of Sumter, in South Carolina, and through this action seeks to recover a balance alleged to be due on a deposit account with the defendant bank. The question presented by the record is, whether certain twelve checks, drawn by the cashier of the Sumter bank, which were paid by the defendant bank, could properly be debited in account to the Sumter bank. Bartlett, its cashier, had drawn them upon the defendant for various amounts; some to the order of A. S. Brown, and some to the order of C. E. Stubbs. In the check-book he would enter sometimes the real amount of the checks, and sometimes an amount much less than the checks actually were drawn for. The names of these payees were those of persons who actually resided in Sumter and were dealers with the bank; but they knew nothing of these checks, and had no connection whatever with the transactions of the cashier in issuing these checks. Bartlett, after having drawn

the checks, indorsed them in the name of the payee; making them payable to the order of some firm of stockbrokers in New York, who collected them from the defendant. By subsequent manipulations of the books of his bank, Bartlett was able to prevent a discovery of his dishonest acts until after he had absconded and the insolvency of the bank was disclosed. The learned trial judge, in dismissing the complaint, discussed the question of what the act of the cashier of the Sumter bank amounted to in law. In his judgment, the cashier's indorsement of the checks in the name of the payee, which he had written in the body of the check, was not, in a legal ^{and} sense, forgery. He said that act did not defraud the persons whose names were used as payees, nor the bank in New York, nor his own bank; but that the fraud consisted in the unlawful drawing of the check, for his own purposes, with the intent to convert his own bank's funds. Regarding the transaction in that light, and the indorsement as a part of one continuous act of preparing the check so that the New York bank should pay the funds drawn upon to the indorsees, he very properly reached the conclusion that, so far as the New York bank was concerned, the cashier's intent was the intent of his bank, and hence, the payment of the checks was conclusive upon it.

At the general term the opinion of the court again carefully reviews the legal questions and sustains the judgment below.

Upon the question of the effect upon the transaction of the use by Bartlett of names, as payees, of persons who were customers of the bank, it is said in the opinion that, that fact did not prevent the application of the principle which would govern if fictitious names had been selected and used for payees. They held, in substance, that the bank, through its authorized officer, had put in circulation paper, with knowledge chargeable to it that the names of the payees did not represent real persons, and with the intention to indorse thereon the names of the payees; who for all intents and purposes, were fictitious payees, and whose names were adopted and resorted to as a device to avoid suspicion.

We think the judgments below were right. Whether indorsing the check in the name of the payee therein was a forgery in the legal sense, or not, is not the important question. In a general sense, of course, the cashier did forge the payee's name, but that fact did not affect the title or rights of the defendant: *Coggill v. American Exchange Bank*, 1 N. Y. 113; 49 Am. Dec. 310. In the case cited, a bill was drawn

upon the plaintiff to the order of one Truman Billings, and was discounted at a bank. The drawer had indorsed it with the name of the payee, Truman Billings; a person who in fact had no interest in the bill. It was held that the defendant in the case, who had accepted and paid the bill, held it by a good title. Bronson, J., ⁵⁶¹ said: "As the payee had no interest, and it was not intended that he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity, and it is fully settled that when a man draws and puts into circulation a bill, which is payable to a fictitious person, the holder may declare and recover upon it as a bill payable to bearer. In legal effect, though not in form, the bill is payable to bearer."

The case of *Shipman v. Bank of the State of New York*, 126 N. Y. 818, 22 Am. St. Rep. 821, which was recently before us, did not decide any question inconsistently with what the courts below have decided. There it had been found that the checks were signed by the firm, in the belief that the names of the payees represented real persons entitled to receive the amounts of the checks, and with the intention that they should be delivered to real payees and should not go into circulation otherwise than through a delivery to, and an indorsement by, the payees named. Bedell was their clerk, whose employment did not comprehend the drawing or indorsing of checks or drafts; and, in indorsing upon the checks the names of the payees, he committed the crime of forgery, because he was without authority in that respect and did so with the intention to deceive his employers, the makers, and to put their checks in circulation for his account. That was a case wholly other than was made out here. It was stated in the *Shipman* case that the maker's intention is the controlling consideration, which determines the character of the paper, and that the statutory rule, which gives to paper drawn payable to the order of a fictitious person, and negotiated by the maker, the same validity as paper payable to bearer, applies only when such paper is put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The principle of that decision is quite applicable to the case at bar. Though Bartlett selected, for the execution of his dishonest purposes, the names of persons who were dealers with his bank, it was, in legal effect, as though he had selected any names at random. The difference is that, by the methods resorted to, ⁵⁶² he averted suspicion on the part

of the directors or other officers of his bank. The names he used were, for his purposes, fictitious, because he never intended that the paper should reach the persons whose names were upon them. The transaction was one solely for the fraudulent purpose of appropriating his bank's moneys, by a trick which his position enabled him to perform. Concededly, if the names of the payees were of fictitious persons, the Sumter bank would have had no claim upon the defendant; how, then, can the transaction be said to assume a different aspect because the names adopted were of known persons? That the intention was to treat them as being of fictitious persons is manifest. As cashier, invested with the authority to draw checks upon the bank's accounts with its correspondents, instead of drawing them directly to the order of the parties, who he intended should get the moneys, he drew them to the order of persons who had no interest in them, and thereupon wrote their names under a direction to pay to the real parties, who were intended to be the recipients of the funds drawn upon. If the checks had been drawn directly to the order of the real parties, the defendant would undoubtedly have been protected in paying them. As it was, the payees were fictitious persons in the eye of the law, and the only real parties were the firms in New York, to whom the cashier sent them in such form as that they could draw the moneys upon them.

The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name. Where, as in this case, the intent of the act was, by the use of the names of some known persons, to throw directors and officers off their guard, such a use of names was merely an instrumentality or a means which the cashier adopted, in the execution of his purpose to defraud the bank, in an apparently legitimate exercise of his authority. The cashier, through his office and the powers confided to him for exercise, was enabled to perpetrate a fraud-upon his bank, which a greater vigilance of its officers ^{see} might have earlier discovered, if it might not have prevented. If his position and the confidence reposed in him were such as to enable him to escape detection for the while, then the consequences of his fraudulent acts should fall upon the bank, whose directors, by their misplaced confidence and gift of powers, made them possible, and not upon

others who, themselves acting innocently and in good faith, were warranted in believing the transaction to have been one coming within the cashier's powers.

It may be quite true that the cashier was not the agent of the bank to commit a forgery, or any other fraud of such a nature; but he was authorized to draw or check upon the bank's funds. If he abused his authority, and robbed his bank, it must suffer the loss. The distinction between such a case and the many other cases, which the plaintiff's counsel cites from, is in the fact that it was within the scope of this cashier's powers to bind the bank by his checks. In transmitting them, made out and indorsed as they were, the bank was so far concluded by his acts as to be estopped from now denying their validity.

For the reasons given, the judgment should be affirmed, with costs.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

CHECKS ON FICTITIOUS PERSONS.—The doctrine which treats a check or bill made payable to a fictitious person or order as one made payable to bearer and negotiable without indorsement, applies only where it is so drawn with the knowledge of the parties: *Armstrong v. National Bank*, 46 Ohio St. 512; 15 Am. St. Rep. 655. A note or bill which, although bearing the indorsement of the payee, has been negotiated by the drawer for his benefit, the payee not being a party to the transaction, may be treated as if drawn payable to a fictitious person: *Oggill v. American Exchange Bank*, 1 N. Y. 113; 49 Am. Dec. 310. Where, without circumstances tending to arouse suspicion, a bank receives money from a stranger, which he deposits in a name assumed by him, the bank is authorized to repay the money to the depositor on the return of the certificate with his indorsement, though the money belonged to the person whose name the depositor had wrongfully assumed: *Fiore v. Ladd*, 22 Or. 202.

BANKS.—LIABILITY FOR FRAUDS OF CASHIER: See the extended notes to *Cochecho Nat. Bank v. Haskell*, 12 Am. Rep. 75, and *Stebel v. First Nat. Bank*, 39 Am. Rep. 760; see, also, *Pahquioque Bank v. Bethel Bank*, 36 Conn. 225; 4 Am. Rep. 80.

VANDERPOEL v. GORMAN.

[140 NEW YORK, 562.]

AN INSOLVENT CORPORATION CAN MAKE A GENERAL ASSIGNMENT to an assignee in trust for the benefit of its creditors.

A FOREIGN CORPORATION MAY, IN NEW YORK, MAKE AN ASSIGNMENT FOR THE BENEFIT of its creditors, there being no law of that state nor of the state of the domicile of the corporation forbidding the assignment. The provisions of the statute forbidding a corporation from making an assignment in contemplation of insolvency, and declaring such assignment to be void, applies to domestic corporations only.

Gibson Putzel, for the appellant.

S. F. Kneeland, for the respondent.

⁵⁶⁶ **PECKHAM, J.** The North River Lumber Company was a company incorporated under the laws of New Jersey, and transacting its business in the city of New York. On the 24th of February, 1891, the corporation made in this state a general assignment to the predecessor of the plaintiff of all its property for the benefit of its creditors and without any preferences.

Subsequent to the assignment certain of its creditors commenced actions against it to recover the amounts of their debts respectively, and in those actions attachments were issued and delivered to the defendant, who was the sheriff of New York county, and he subsequently levied, by virtue of such attachments, upon property which was alleged to belong to the corporation.

The plaintiff, as its general assignee, has commenced this action to recover from the defendant the value of the property thus levied on by him. The question turns upon the validity of the general assignment of the corporation to the plaintiff. If it were a legal and valid act, it carried the title to the property in question to the plaintiff, and if not, then the defendant was justified in his levy. The defendant on the trial objected to evidence of the assignment, and urged as grounds for his objection: 1. That a foreign corporation cannot, under the laws ⁵⁶⁷ of this state, while insolvent or in contemplation of insolvency, make a general assignment for the benefit of creditors; 2. That if such corporation could make that kind of an assignment it could not make it in the manner of this instrument, viz., by the signature of an alleged president and secretary; 3. There is no sufficient proof of any

authority on the part of the persons executing this assignment to make a general assignment for the benefit of creditors.

The trial court sustained the defendant's objections, and upon appeal the judgment entered in defendant's favor was affirmed by the general term of the New York common pleas. The plaintiff has appealed from such judgment of affirmance to this court.

The defendant's first ground of objection must mean that the courts of this state will not recognize as valid, so far as respects property within their jurisdiction, a general assignment of its property, made for the benefit of its creditors, by an insolvent foreign corporation. The law of the domicile of the foreign corporation may of course permit it, upon insolvency, to assign all its property to an assignee in trust for its creditors, and it also might permit it to make such an assignment through its agents, who were at the time domiciled in a foreign state. But the state which created the corporation could not exercise jurisdiction in another state where the corporation might have property, and in such case the question would be one for the state in which the property was situated to determine as to the validity of the attempted transfer of title to an assignee. Assignments of personal property which are valid by the law of the domicile of the assignor, are generally recognized as valid by the law of the state where the property may be situated, unless they violate its statutory law or its known and settled public policy: Cases cited in *Barth v. Backus*, 140 N. Y. 230; *ante*, p. 545.

In the case just cited we refused to recognize the validity of the assignment of a foreign corporation to a foreign assignee as against those who took title to the property of the ^{see} assignor in this state by virtue of proceedings under our attachment laws. The refusal was based upon our holding that the law under which the general assignee of the Wisconsin corporation claimed title was in effect a bankrupt law enacted by the legislature of Wisconsin, and laws of that nature are within one of the admitted exceptions to the general rule which recognizes the validity of assignments of personal property if valid by the law of the domicile of the party making them: Authorities in the case cited.

There can be no doubt that an insolvent corporation could at common law make a general assignment in trust to an assignee for the benefit of its creditors: *Haxtun v. Bishop*, 3 Wend. 13; *De Ruyter v. Trustees of St. Peter's Church*, 3 Barb.

Ch. 119, 124; on appeal, 3 N. Y. 238; 2 Morawetz on Corporations, sec. 802, and note. Under the law of New Jersey, in which state the corporation was created, its right to make an assignment of this nature seems to be established: *Wilkinson v. Bauerle*, 41 N. J. Eq. 635. At any rate no statute of New Jersey prohibiting such an assignment was proved by defendant, and we cannot presume that the common law has been altered in New Jersey upon this subject without some proof to that effect.

The assignment of property by an insolvent corporation for the purpose of paying its debts is a very different action from so disposing of its property while solvent as to make its continued exercise of its franchises impossible: *People v. Ballard*, 134 N. Y. 269, 294.

The Ballard case was subsequently brought to the attention of this court on a motion for a reargument upon the question whether such a sale or transfer of property as appeared to have been made by the corporation was not valid upon the ground that the corporation could not operate the business except at a loss, and it was not bound to do that: *People v. Ballard*, 136 N. Y. 639. The question was left open, for the reason mentioned in the opinion given upon denying the motion. The case is no authority for the proposition that an insolvent corporation cannot make a general assignment for the benefit of creditors.

See As the common law permits such an assignment, and the state of New Jersey also permits it, and as it does not appear that the charter or by-laws of this particular corporation prohibit it, we are left to the question whether there is any statute or public policy in this state which would be violated if the courts should recognize the validity of an instrument good at common law and good in the state which created the corporation.

The power of the legislature to impose terms upon a foreign corporation as a condition for granting it leave to do business within another state is admitted: *Paul v. Virginia*, 8 Wall. 168; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566.

The sole question now is as to what has been the legislative action of this state upon this subject. The defendant alleges that there is a statute of this state which prohibits such act on the part of a foreign corporation. The statute referred to is chapter 564 of the Laws of 1890, section 48; Sess. Laws, 1075. It is, in substance, the same as section 4, title 4, ar-

ticle 3, chapter 18, part 1 of the Revised Statutes (1 Rev. Stats., 603, sec. 4), after its amendment by subdivision 4 of section 1 of chapter 245 of the Laws of 1880. It provides, among other things, that no corporation shall make any transfer or assignment to any person whatever in contemplation of its insolvency, and every such assignment is declared to be void. We have no doubt that this section refers solely to domestic corporations. The whole of the chapter from which the section is taken is, in substance, a revision of the law relating to certain classes of corporations as contained in the Revised Statutes and their amendments, and it is plain that those statutes generally, if not in every provision, referred to domestic corporations only. This opinion is arrived at by a reference to the whole subject matter treated of in this portion of the Revised Statutes, and it becomes apparent from a perusal of those general provisions that the statutes were designed for the government and regulation of corporations created by this state.

When the language used in the particular section is referred to it becomes still more apparent that it is only applicable to domestic corporations.

570 The legislature declares, as above stated, that certain transfers or assignments made by the corporation shall be void. What power had the legislature to enact any such provision as to a foreign corporation? There is nothing in the section limiting its scope and effect to such property as the foreign corporation might have within this state. It is a broad enactment affecting every assignment made by a corporation under the circumstances mentioned. Can it be supposed that the legislature had in mind a foreign corporation, and intended to assume a jurisdiction to declare such an act, even when done outside this state, and in respect to property also outside of its boundaries, to be void and of no effect? This cannot be supposed, for we cannot impute to the legislature such ignorance upon the subject of its inability to give extraterritorial effect to its own laws. And if it had foreign corporations in mind when proposing to legislate upon the subject, and knew it could not affect the validity of such transfers outside this state, and intended to provide that such transfers should not carry the title to property of the corporation held within this state and subject to our jurisdiction, it must be clear that language somewhat appropriate to express such purpose would have been used. The language actually

used was neither apt nor pertinent for this purpose. It is both appropriate and pertinent when applied to domestic corporations only.

The language of the section clearly implies full and complete jurisdiction over the whole subject matter. It implies the right to forbid absolutely. It also implies the right to declare the consequences of a violation of the prohibition, not in regard to some particular property, but generally and absolutely. The legislature has such jurisdiction in the case of domestic corporations, while in the case of foreign corporations it has not. To render the section applicable to foreign corporations would be to discard the plain meaning of the language used. The provisions of the Revised Statutes (1 Rev. Stats., 591, sec. 9), as to transfers by a corporation when insolvent or in contemplation of insolvency, prohibiting them when made with intent to give preferences, etc., were said to apply only to ²⁷¹ domestic corporations: *Coats v. Donnell*, 94 N. Y. 168. We have no doubt of the correctness of the statement. The same reasons are applicable in both cases, and if section 9 do not apply to foreign corporations, nothing can be found in the language of section 48 of the Laws of 1890 (cited *supra*) which would extend it to other than domestic corporations. As the prohibition is not contained in any statute of the state, we are unable to discover any public policy of the state which would stand in lieu of a positive statute, and prohibit our recognition of the validity of this transfer.

It is urged that such a policy is to be found in this same statute, even though it in terms applies only to domestic corporations.

The argument is that if the state refuses to its own corporations the privilege of making such an assignment, it surely cannot be consistent with its policy to permit the exercise of the same privilege by a foreign corporation. The statute while only applicable to domestic corporations is thus used as evidence of the public policy of the state with regard to foreign corporations. If it were a question of the simple grant of a privilege, it may well be that what this state denied to its own corporations it would not grant to those from a foreign state. It is not, however, the mere question of the exercise of a certain privilege which is to be affirmatively granted in order to exist. The right to make such an assignment exists inherently in all corporations unless specially forbidden. In regard to domestic corporations it has been specially for-

bidden. Does that prohibition furnish any legitimate evidence of the existence of a public policy in this state which forbids in the case of a foreign corporation the exercise of this inherent right? It seems to us that it does not. The two kinds of a corporation, domestic and foreign, stand with reference to this subject in very different circumstances and positions towards the state. What might be proper or necessary in one case might be wholly inappropriate or impossible of complete execution in the other. As to domestic corporations we assume certain responsibilities arising out of the ⁵⁷²very liberty given by the state for their creation or formation. We provide for their birth, for their regulation and government during life, and for their death. Upon their dissolution, which no other power than the state itself, acting through its legislature or its courts, can pronounce, the whole power of the corporation ceases, and the property which the corporation leaves passes under the dominion of the sovereignty which created it. Responsible for its creation, for its government and for its death, the state has assumed in such cases complete and full jurisdiction over the corporation and its property, and, accordingly, the state has, in a series of statutory provisions, made certain that the corporate property shall be distributed in accordance with its own ideas of justice. On the other hand, in the case of a foreign corporation, the same kind of responsibility does not obtain. Our courts cannot dissolve it, nor can we, by virtue of our laws, in any way affect its property situated outside of the state, nor call it to any account therefor. Hence, while as to a domestic corporation we provide for the distribution of its property equally to all its creditors, foreigners as well as residents, we could as to a foreign corporation simply affect the property which it had in this state.

It is true that even with regard to a domestic corporation we cannot give an extraterritorial effect to our laws. Property of a domestic corporation situated outside of the state would not be subject to our jurisdiction. In such case, however, the principle of comity operates, and we should expect recognition of the validity of a disposition of the personal property of a domestic corporation situated outside the state, provided it was valid by our law, unless it were subject to some of the well-known exceptions to such recognition. As to a foreign corporation with property here, if we refused to recognize as valid the disposition made of its property within this state, it

would probably in that case remain subject to be seized by the vigilant creditor, resident or nonresident, and a preference be thus obtained which is at war with the policy of our state as to domestic corporations.

⁵⁷² It is thus seen that there are differences of a marked character between a domestic and a foreign corporation in relation to this subject. The differences are so marked that the statute regarding domestic corporations can furnish no proof as to the existence of a public policy which, in the case of foreign corporations, should stand in the place of, and be equivalent to, that statute.

Again, this assignment is valid by the law of New Jersey, which is the domicile of the corporation. It provides for an equal distribution of all the property of the corporation among all of its creditors, being in this respect in entire conformity with our own policy regarding the distribution of the property of insolvent domestic corporations. Is not the argument quite strong under such circumstances which favors the application of the general rule that an assignment of personal property, valid by the law of the domicile of the owner, will be recognized as valid everywhere? Can it be said in such a case that the interests of our own citizens are in any manner neglected by their own state when they are to share equally in the assets with all the other creditors of the corporation? If it were a domestic corporation they would get no more than an equal rate of division. Can they be said to be legally harmed when they get the same rate of division under such an assignment? Are we not in such case only following the general doctrine which refers the validity of the transfer of personal property to the law of the domicile of its owner? It is true that the assignment in this case was made by the corporation through its officers in New York, where it was doing business, but nevertheless it was a New Jersey corporation, and the assignment was valid by the law of that state. Whether, if the law of New Jersey prohibited such an assignment, and it was then executed under the same circumstances in this state, it would be valid here, is a question not involved in this case, and, therefore, neither discussed nor decided.

It is said that our own creditors, that is, I suppose, those who reside in this state, may in this manner be defeated of satisfaction of their debts by the participation of foreign creditors ⁵⁷⁴ in the only accessible funds of the insolvent company. We have seen that our policy is just such a par-

ticipation with regard to creditors of a domestic corporation. Why should we find fault with such a result in the other case? The general term of the supreme court in the first department has decided that the statute, in relation to a transfer of any part of its property by a corporation in contemplation of insolvency and for the purpose of giving preferences, does not apply to a foreign corporation: *Lane v. Wheelwright*, 69 Hun, 180.

The same question is touched upon, although perhaps not necessarily decided in *Coats v. Donnell*, 94 N. Y. 168. In that case the agreement for the lien was made at the same time and as part of the agreement to make the advances, and such agreement was held valid. It was added, however, that if the act were regarded as the giving of a preference by a failing debtor, it was good because the law against preferences by an insolvent corporation did not apply to a foreign one.

Here there is no preference, and, hence, there is no occasion to examine the *Coats* case to see if the question of a preference in contemplation of insolvency was involved and decided in it. It may be that there is no difference in principle between an assignment of part of the property of a corporation to a creditor as a preferred payment of its debt to him and a general assignment of all its property to an assignee for the benefit of creditors and giving preferences, and that if the former be valid the latter must also be good. In regard to such a general assignment it has been urged that it ought to be held invalid because of the fact that the property of a corporation is a trust fund for the benefit of creditors, and that any creditor ought to have the right to resort to chancery to compel the application of this trust fund *pro rata* for the benefit of all creditors, upon the principle that equality is equity.

As the question does not arise in this case it is unnecessary to further pursue the inquiry.

The counsel for the defendant cites the statute prohibiting a corporation from setting up the defense of usury, and he suggested that it has been held to include foreign corporations: ⁵⁷⁵ *Southern Life Ins. Co v. Packer*, 17 N. Y. 52. There is no doubt that it was so intended, and the language is apt and appropriate to express the idea. The legislature had perfect and complete control in such respect over the foreign, as well as over the domestic, corporation, and there was no reason for denying to the statute its natural meaning, which

would include a foreign corporation when suing or being sued in the courts of this state.

The case of *In re Estate of Prime*, 136 N Y 847, is an authority in favor of the view here taken. It is there stated that generally a statute giving powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to domestic corporations. The remark was made in the case that a general law of the state prohibiting corporations from exercising particular powers would operate upon foreign corporations, not because the act *ex proprio vigore* would bind such a corporation, but for the reason that the exercise of such a power by the foreign corporation would violate the public policy of the state indicated by the general restraint imposed upon our own corporations. Considering the question which was under discussion and the facts which called forth the remark, it is entirely plain that the proposition as really intended is perfectly sound.

If the exercise of certain powers by a foreign corporation in this state would violate our public policy, there is no doubt that the corporation could not here legally exercise such powers, and the fact that it did violate our public policy might in many cases be proved by our statute in regard to our own corporations. But it was not intended to assert that in all cases where a statute did prohibit corporations from doing certain things, it necessarily included foreign corporations, or that such corporations could not thereafter exercise any power prohibited to a domestic corporation, because in such case its exercise by a foreign corporation would be a violation of a public policy evidenced by the statute. I think I have shown in the case at bar that the difference between the two classes of corporations, with reference to the thing prohibited ⁵⁷⁶ to the domestic corporation, precludes this kind of proof of a public policy in this state upon this subject with regard to a foreign corporation. We think there is no such public policy, and, so far as this ground is concerned, we have no doubt that the assignment is valid.

As to the other grounds of invalidity, we are of the opinion that there is nothing in them. The corporation had the power to make an assignment. It was a corporate act, and neither the statute nor any by-law, so far as the record shows, provided that it should be otherwise done than by the president and secretary or treasurer, under the authority of the

board of directors. This sufficiently appears to have been so done, and that is enough: *Beveridge v. New York Elevated R. R. Co.*, 112 N. Y. 1.

The judgment should be reversed, and a new trial ordered, costs to abide the event.

All concur, except BARTLETT, Jr, not sitting.

Judgment reversed.

CORPORATIONS—POWER TO MAKE AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS.—A corporation may make an assignment for the benefit of its creditors: *Albany etc. Steel Co. v. Southern Agricultural Works*, 76 Ga. 135; 2 Am. St. Rep. 26; *State v. Bank of Maryland*, 6 Gill & J. 205; 25 Am. Dec. 561; *McCallie v. Walton*, 37 Ga. 611; 95 Am. Dec. 363, and note; *Ossert v. Rogers*, 38 Mich. 363; 31 Am. Rep. 319; *Pope v. Brandon*, 2 Stew. 401; 29 Am. Dec. 49; *Pyles v. Furniture Co.*, 30 W. Va. 123. See also the extended note to *Miners' Ditch Co. v. Zellerbach*, 99 Am. Dec. 335.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

SPENCER v. HAMILTON.

[113 NORTH CAROLINA, 49.]

MEASURE OF DAMAGES FOR THE VIOLATION OF A CONTRACT includes all damages caused by the breach, or such as being incidental to the act of omission or commission as a natural consequence thereof, may reasonably be presumed to have been in the contemplation of the parties when the contract was made.

DAMAGES—MEASURE OF WHEN PARTY INJURED MIGHT HAVE SUPPLIED THE OMISSION FROM WHICH THE INJURY RESULTED.—When a lessor contracts to clean out certain ditches, and fails to do so, the lessee's right of recovery is not limited to the amount which it would have cost him to do the work which the lessor covenanted to perform.

DAMAGES—MEASURE OF BETWEEN LESSOR AND LESSEE.—If a lessor covenants to clean out certain ditches on the leased premises, and fails to do so, he is answerable, and the measure of damages is the amount which the net yield of the lessee's crop was lessened by the failure to put the land in the condition stipulated for in the lease, though he might himself have cleaned out the ditches for a less sum.

ACTION to recover rents due. The defendant interposed a counterclaim for damages alleged to have been suffered by him by reason of the plaintiff's failure to clean out certain ditches on the leased premises. In support of his counterclaim the defendant sought to prove that because of the ditches not being cleaned out his crops had been injured and their yield diminished. This evidence was excluded on the objection of the plaintiff, and the court instructed the jury that the measure of damages for the failure of plaintiff to clean out the ditches was what it would have cost the defendant to have had the work done, and not the difference in the value of the crop raised on the land, and what would have been

raised thereon, had the ditches been put in proper condition. The jury found that the plaintiff had been guilty of a breach of his lease in not cleaning out the ditches, and assessed the damages at twenty-five dollars. The defendant moved for a new trial, and this being denied, appealed.

W. B. Rodman, for the plaintiff.

Charles F. Warren, for the defendant.

⁵⁰ CLARK, J. "Where one violates his contract he is liable only for such damages as are caused by the breach, or such as being incidental to the act of omission or commission, as a natural consequence thereof, may reasonably be presumed to have been in the contemplation of the parties when the contract was made. This rule of law is well settled, but the difficulty arises in making its application": Pearson, J., in *Ashe v. De Rossett*, 5 Jones, 299; 72 Am. Dec. 552. There was evidence that defendant leased the land for one hundred dollars, and as a part of the contract of leasing, the lessor was to have certain ditches cleaned out, and by his failure to do so the land was flooded, and the ⁵¹ crop lessened. Here it was in contemplation of both parties that the cleaning out of the ditches was essential to the making a full crop, and that the failure to do so would lessen the production. The question, therefore, what effect the failure to clean out the ditches and canal had upon the crop, and to what extent it was damaged thereby, was competent, as giving some light to the jury in measuring the damages sustained by defendant by breach of the contract by lessor.

The difference between the crop made and what would have been made if the ditches had been cleaned out, does not exactly measure the loss, as it would have cost something to house the additional yield. The true test is how much was the net yield of defendant's cropping for the year lessened by the failure to put the land in the condition stipulated for by the lessor. The decreased production was an important factor in arriving at that conclusion. The difference in profit and yield between land drained and not drained was clearly in contemplation of the parties in making the contract.

In telling the jury that the difference was what it would have cost defendant himself to clean out the ditches, the court below erred. It is true the defendant might have put the ditches and canal in order, and if so he could have charged the lessor with the costs thereof. This would have been the

better course; but perhaps he was not able. At any rate, he was not legally called upon to do this. It was the lessor who contracted to rent a drained farm, and the defendant's loss by having to work an undrained farm instead of the measure of damages.

The case of *Sledge v. Reid*, 73 N. C. 440, is not analogous. That was a case of tort for wrongfully taking a mule. The primary loss was the value of the mule, and that the taking him hindered the plaintiff in making a crop was purely incidental and the damage to the crop was too remote. This case is more like *Mace v. Ramsey*, 74 N. C. 11, but differs from it in that here the farm was rented and the enterprise ⁵² proceeded with; but its profitableness was impaired by the failure of the lessor to do the draining after the lessee had proceeded with his farming operations, relying upon the lessor's stipulation. As in *Mace v. Ramsey*, 74 N. C. 11, we may say, "This case is easily distinguishable from *Foard v. North Carolina R. R. Co.*, 8 Jones, 285; 78 Am. Dec. 277; *Ashe v. De Rosssett*, 8 Jones, 240; *Boyle v. Reeder*, 1 Ired. 607, and *Sledge v. Reid*, 73 N. C. 440, and similar cases, in that in those cases the damage was incidental and unforeseen, or merely vague, uncertain, and conjectural. And in this they are immediate, necessary, and reasonably certain, and such as were in the contemplation of the parties to the contract."

Error.

DAMAGES—MEASURE OF FOR BREACH OF CONTRACT.—Damages for the breach of a contract should be such as may fairly and reasonably be considered as arising naturally; that is, according to the usual course of things from such breach, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contracts, as the probable result of its breach: *Paducah Lumber Co. v. Paducah Water etc. Co.*, 89 Ky. 340; 25 Am. St. Rep. 536, and note. See further discussion of this subject in the extended notes to *Fontaine v. Schulenburg etc. Lumber Co.*, 32 Am. St. Rep. 655; *Trigg v. Clay*, 29 Am. St. Rep. 729, and *Stanley v. New York etc. Ry. Co.*, 21 Am. St. Rep. 121.

**SIMMONS v. NORFOLK AND BALTIMORE STEAMBOAT
COMPANY.**

[118 NORTH CAROLINA, 147.]

CORPORATIONS, DUTY OF TO KEEP PLACE OF BUSINESS WITHIN THE STATE.

It is the duty of every corporation formed under the laws of North Carolina to keep its principal place of business, its books, and its principal office within the state, to the extent necessary to the fullest jurisdiction and visitatorial power of the state and its courts, and the efficient exercise thereof in all proper cases which concern such corporation.

IF A CORPORATION FORMED UNDER THE LAWS OF THE STATE WITHDRAWS ITS PRINCIPAL PLACE OF BUSINESS, and all its officers, therefrom the courts are authorized to decree its dissolution under a statute empowering them to dissolve a corporation for any abuse of its powers to the injury of its corporators or of its creditors or debtors.

AMENDMENT OF SUMMONS.—If a summons is improperly made returnable to the court in term time, the court may direct that it be amended so as to make it returnable before the clerk on a day certain.

ACTION to dissolve the corporation defendant. Judgment for the plaintiff. Defendant appealed.

Don. Gilliam, for the plaintiff.

Batchelor and Derereux, and J. E. Moore, for the defendant.

¹⁵⁰ **SHEPHERD, C. J.** This proceeding is brought for the purpose of obtaining a decree of dissolution against the defendant company, and the most important question to be considered is, whether the complaint sets forth facts sufficient to entitle the plaintiff to the relief prayed for.

The defendant was incorporated under the general act for the formation of corporations (the code, chapter 16), and it is therein provided, among other things, that all corporations so created may be dissolved by "special proceedings" instituted by any corporator "for any abuse of its powers to the injury of the plaintiff or of the corporators, or of its creditors or debtors": Sec. 694.

The articles of incorporation provide that the business of the defendant shall be the "transportation of produce and ¹⁵¹ merchandise and all other kinds of freight and passengers to and from the various landings on the Roanoke river in North Carolina, to and from the cities of Norfolk, in Virginia, and Baltimore, in Maryland, and to and from said cities to the said landings, and to and from all other points intermediate between said river and said cities, and its principal place of business shall be in Williamston," in this state. The

plaintiff, who is one of the corporators, alleges that in 1887 the control and management of the defendant corporation passed into the hands of nonresident stockholders, "since which time the original aim and purpose of said corporation has been departed from, the value of the company's property greatly depreciated, the business fallen away, and its general affairs gradually but steadily grown worse." It is further alleged "that for more than a year now past the defendant company has altogether ceased to operate said ports, or any of them, within this state; that no single agency or place of business has been maintained within this state, and that the town of Williamston has been absolutely discontinued as the principal place of business of said company, as required by said article of incorporation."

"It is a tacit condition of a grant to a corporation that the grantees shall act up to the end or design for which they are incorporated, and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter as for condition broken, or for breach of trust. The duties assigned by an act of incorporation are conditions annexed to the grant of the franchises conferred (Angell and Ames on Corporations, sec. 776), "and duties implied are equally obligatory with duties expressed, and their breach is visited by the same consequences": *Attorney General v. Petersburg etc. R. R. Co.*, 6 Ired. 456; Field on Corporations, 456 n.

It has been held, without reference to any express provision of law or specific requirement of the charter, that it is the duty of a corporation to keep its principal place of business, its books and records and its principal officers within the ¹⁸⁹ state which incorporated it, to an extent necessary to the fullest jurisdiction and visitatorial power of the state and its courts, and the efficient exercise thereof in all proper cases which concern said corporation: *State v. Milwaukee etc. Ry. Co.*, 45 Wis. 579. In commenting upon this decision, Mr. Morawetz on Private Corporations, 361, says: "This doctrine is correct only provided the legislature has expressed the policy of the state by some special enactment, or by a general system of legislation regarding incorporated companies. There is no such rule at common law. It is always implied in the grant of a charter of incorporation, where there is no indication to the contrary, that the company shall have its central office or place of management in a state under whose laws it was organized. This, however, is merely a rule ap-

plicable to the construction of charters in determining the intention of the corporators and of the state, and is not an arbitrary rule of law." Accepting the principle as thus modified, and applying it to a corporation doing business like the defendant, exclusively under a charter granted in this state, it would seem very clear that by the policy of our laws, as indicated by "a general system of legislation," the duty referred to is imposed upon the defendant. We have many statutes which plainly contemplate that such a corporation shall keep its principal place of business, certainly some of its agencies, within the limits of the state. Of such are sections 362 and 363 of the code, relating to the attachment of shares of stock in corporations and the interest and profits thereon, and authorizing the service of a certified copy of the warrant of attachment on "the president or other head of the association or corporation, or with the secretary, cashier or managing agent thereof." Of such also are the provisions of section 694 of the code, authorizing the dissolution of the corporation upon the return of an execution unsatisfied upon a judgment docketed in the superior court of the county "where it has its only or principal place of business." ¹⁵³ Reference may also be had to the visitorial powers conferred upon the board of railroad commissioners, which, together with other provisions of the law, clearly show that a corporation of this character cannot entirely withdraw all of its offices and agencies from the state.

The decision in *State v. Milwaukee etc. Ry. Co.*, 45 Wis. 579, was based to some extent upon similar statutory provisions, and the general principle of that case has been here discussed for the purpose of showing that the express provision of the charter of the defendant, requiring its principal place of business to be at Williamston in this state, may well be sustained by the general policy of our laws. The case is also direct authority that such a violation by a corporation of its charter is "an abuse and misuser of its corporate powers," and is within the spirit and meaning of our statute upon the subject. Without considering, then, the other causes assigned in the complaint, we are of the opinion that the persistent violation of the charter in withdrawing, as alleged, the principal place of business from Williamston, and all of its agencies from the state, would authorize the court to decree a dissolution of the defendant corporation: *Attorney General v. Petersburg etc. R. R. Co.*, 6 Ired. 456.

The summons in this proceeding was improperly made

returnable to the superior court in term, and his honor remanded the proceeding with directions that the summons be amended so as to make it returnable before the clerk on a day certain. This order, together with the other directions to the clerk, is fully sustained by the principle laid down in *Epps v. Flowers*, 101 N. C. 158. The judgment must be affirmed.

CORPORATIONS—RESIDENCE.—Corporations are local to the state creating them, and must have their business locations therein: *Aspinwall v. Ohio etc. R. R. Co.*, 20 Ind. 492; 83 Am. Dec. 329, and note. A corporation must dwell in the place of its creation, and cannot migrate to another sovereignty: *Baltimore etc. R. R. Co. v. Glenn*, 28 Md. 287; 92 Am. Dec. 688; *Clark v. Bank*, 10 Ark. 516; 52 Am. Dec. 248; *County of Allegheny v. Cleveland etc. R. R. Co.*, 51 Pa. St. 228; 88 Am. Dec. 579; *Ohio etc. Trust Co. v. Merchants' etc. Trust Co.*, 11 Humph. 1; 53 Am. Dec. 742; note to *Young v. South Tred-egar Iron Co.*, 4 Am. St. Rep. 760.

PROCESS—AMENDMENT OF RETURN.—Liberal discretion is reposed in the court upon due notice to parties adversely interested to amend returns on process: *Jeffries v. Rudloff*, 73 Iowa, 60; 5 Am. St. Rep. 654, and note. This question is fully discussed in the extended note to *Malone v. Samuel*, 13 Am. Dec. 173-181, and the note to *Reinhart v. Lugo*, 21 Am. St. Rep. 57.

CHEATHAM v. YOUNG.

[113 NORTH CAROLINA, 161.]

EVIDENCE OF THE CONTENTS OF A PUBLIC WRITING may consist of the original, identified by sufficient evidence, or of a copy thereof duly certified.

EVIDENCE.—PUBLIC WRITINGS ARE RECEIVABLE ONLY in proof of those matters, the remembrance of which they were called into existence to perpetuate.

EVIDENCE.—THE RECORDS OF THE MEETING OF TOWN COMMISSIONERS showing the location or width of a pre-existing public street are admissible in evidence for the purpose of proving such location or width, if made before the controversy arose in the trial of which such evidence is offered. Such record, though not conclusive, is competent evidence to locate the boundary of the streets.

PLEADING—STATUTE OF LIMITATIONS.—IN EJECTMENT defendant may prove prescriptive title in support of his general denial of the plaintiff's ownership.

EJECTMENT for a small strip of land. The title of the parties was dependent upon the width of certain streets in the town of Henderson. The court, against the plaintiff's objection, received in evidence certain records of the commissioners of the town declaring that the street one hundred and ninety feet northwest of Garnett street, and running parallel thereto,

should be called Wyche alley, and that a committee should be appointed to assist in widening Garnett street by taking eight feet on the south side and twelve feet from the north side, making such street eighty-six feet wide instead of seventy-five feet. The defendant relied upon adverse possession in the argument before the jury, and the court refused to charge that he must have pleaded the statute of limitations and offered evidence in support of his plea to entitle him to rely upon prescriptive title. Judgment for the defendant, plaintiff appealed.

Pittman and Shaw, for the plaintiff.

A. C. Zollicoffer, for the defendants.

164 AVERY, J. The statement of the case on appeal is not so full or so clear as it might have been made. But it seems to have become material to the location of the plaintiff's boundary to determine where Montgomery street intersected with Garnett street and with Wyche alley; and one of the questions involved in this inquiry was, What was the width of Garnett street, and what the distance from it to said alley? Neither the map used upon the trial nor any one of the deeds is sent up as an exhibit, and it does not appear in express terms from the testimony what was the description of the land claimed by the plaintiff.

Assuming that the inquiry of the jury was directed to the point mentioned, the first exception is to the competency of the minutes of the proceedings of the mayor and board of commissioners of the town of Henderson at two meetings, held respectively on the 22d and the 26th of May, 1866 (*ante* 165 *litem motam*), at one of which the entry was, "On motion, the street one hundred and ninety feet northwest of Garnett, and running parallel with Garnett, shall be called as formerly, Wyche alley"; and at the other it appeared that a committee was appointed to assist the surveyor in widening Garnett street from John H. Young's corner to Breckenridge street, so as to make it eighty-six instead of seventy-five feet, as it then was, "by taking eight feet on the south side and twelve feet on the north side."

Where it becomes material to prove the contents of such a record, the party relying upon it may identify and offer the original or introduce a copy properly certified: *State v. Voight*, 90 N. C., 741; The Code, sec. 1342; 1 Greenleaf on Evidence,

485. In this case the original having been identified by the testimony of Dr. Young, only the question whether such a record as that put in evidence is competent is worthy of serious consideration or discussion.

The principle upon which records such as these in question are usually admitted as evidence, when duly certified or satisfactorily identified, has been very clearly stated by an eminent textwriter: "Documents of a public nature and of public authority are generally admissible in evidence, although their authenticity be not confirmed by the usual and ordinary tests of truth, the obligation of an oath and the power of cross-examining the parties, on whose authority the truth of the document depends. The extraordinary degree of confidence thus reposed in such documents is founded principally upon the circumstances, that they have been made by authorized and accredited agents appointed for the purpose, and also partly on the publicity of the subject matter to which they relate. . . . Those who are empowered to act in making such investigations and memorials are in fact the agents of the individuals who compose the public." Such public writings are "only receivable, however, in proof of those matters the remembrance of which they were called into existence to perpetuate": 1 Greenleaf on Evidence, secs. 483 and 484; Best on Evidence, sec. 219; *Clarke v. Diggs*, 6 Ired. 159; 44 Am. Dec. 73; *Brundred v. Del Hoyo*, 20 N. J. L. 323; *Swinerton v. Columbian Ins. Co.*, 9 Bosw. 361. The records offered were made by the governing officials of a town, which was a public agency established with defined powers, one of which was to locate, open, or widen the public streets. They were made long before the present controversy arose, and bear intrinsic testimony to the fact that the object in passing them was to fix the relative positions and bounds of Garnett street and Wyche alley, and incidentally the points of their intersection with Montgomery and other streets running diagonally across both. Such records being publicly made by public agents, and presumably for the public benefit, may be more safely admitted to show where the streets of a city or town are located than the declarations of even disinterested deceased persons as to the situation of the lines and corners of land. It has been said that the admission of hearsay evidence as to questions of boundary had its origin partly in the obsolete rule which made it competent to prove prescription by general reputation,

and partly in the fact that "in many sections of this country a single surveyed boundary line is common to a number of estates, becoming in this manner a quasi matter of general interest": *Boardman v. Reed*, 6 Pet. 328; *Shook v. Pate*, 50 Ala. 91. In *Davidson v. Arledge*, 97 N. C. 172, it was held that a map of the city of Charlotte, shown to have been recognized by the authorities of the city for fifteen years, was competent as testimony tending to show the location of the streets laid down thereon and the distance from one to the other. This ruling seems to have been founded upon the fact that the map was made under the direction of, and was approved and corrected by, the public agents, whose duty it was to fix the limits of streets, and who were presumed to have acted properly, and to have caused an accurate delineation of their true location to be made for their own guidance. The presumption of accuracy of the map was doubtless ¹⁶⁷ a rebuttable one in the same way the official declaration as to the proper location of Wyche alley and its distance from Garnett street, and as to the increased width of Garnett street, is competent though not conclusive evidence to locate a boundary line, when the streets named or their points of intersection were called for in the deed: 2 Wharton's Evidence, sec. 1310.

It is well settled that it is competent for a defendant to prove possession by himself and those under whom he may claim, for seven years, in support of a general denial in the answer that the plaintiff is the owner, without specially pleading the statute: *Farrior v. Houston*, 95 N. C. 578; *Falls of Neuse Mfg. Co. v. Brooks*, 106 N. C. 107.

There was no error, therefore, either in admitting the testimony objected to or in the refusal of the charge as asked by the plaintiff.

No error.

EVIDENCE—PROOF OF PUBLIC DOCUMENTS GENERALLY.—Proof of public papers may be made by duly authenticated copies: *Hammatt v. Emerson*, 37 Me. 398; 46 Am. Dec. 598. Where an original document is of a public nature, an examined copy thereof is admissible in evidence: *Ridgway v. Farmers' Bank*, 12 Serg. & R. 256; 14 Am. Dec. 681, and note.

EVIDENCE—PUBLIC DOCUMENTS AS.—Official books, papers, and records are competent evidence of the facts to which they relate when duly proved: *Dikeman v. Parrish*, 6 Pa. St. 210; 47 Am. Dec. 455, and note with the cases collected; *Bow v. Allentown*, 34 N. H. 351; 69 Am. Dec. 489, and note. It has been long and well settled that the records of public or municipal corporations are properly admissible in evidence generally to prove facts stated

by them; extended note to *Snyder v. Manchester etc. R. R. Co.*, 13 Am. St. Rep. 550.

EXEMPTION—PLEADING STATUTE OF LIMITATIONS AS A DEFENSE.—This question will be found fully treated in the monographic note to *Stocker v. Green*, 4 Am. St. Rep. 382-384.

HILL v. PIONEER LUMBER COMPANY.

(118 NORTH CAROLINA, 178.)

CORPORATIONS.—DIRECTORS OF AN INSOLVENT CORPORATION CANNOT SHOW TO THEMSELVES A PREFERENCE.

CORPORATIONS—DIRECTORS.—CONFESSION OF JUDGMENT BY AN INSOLVENT CORPORATION in favor of one of its directors will not be permitted to operate as a preference to the prejudice of other creditors. A director creditor upon a debt theretofore existing cannot take advantage of his superior means of information to secure his debt as against other creditors.

SUIT to set aside a judgment confessed by a corporation in favor of one of its directors. A decree was entered granting the relief sought by the plaintiff. The defendant appealed.

Aycock and Daniels, for the plaintiffs.

Busbee and Busbee, for the defendants.

174 **MACRAE, J.** This case is presented to us as upon a demurrer, all the facts alleged in the complaint being admitted in the answer, and the conclusion of law contended for by the
175 plaintiff being denied, thus raising the issue of law whether the facts stated in the complaint constitute a cause of action.

It is admitted in the pleadings that at the time of the confession of judgment in favor of G. A. Griswold against the Pioneer Lumber Company, the defendant corporation was insolvent; that said Griswold and one Hall were the only stockholders, and constituted the board of directors; that said Hall was president, and said Griswold was secretary and treasurer of said corporation, and that Griswold was present at, and participated in, the meeting at which resolutions were adopted directing Hall, as president, to confess judgment against the company in favor of Griswold. On this state of facts the plaintiff, I. F. Hill, contends that the directors became trustees of the corporate property for the benefit of the creditors, and could not take advantage of their knowledge and position to gain an advantage over the other creditors.

We advert to the fact that there appears to be but two

members of the defendant corporation. But for the admission in the answer we might inquire whether there has been such an incorporation as is permitted by section 677 of the code, as this privilege is extended to any number of persons not less than three. However, as the answer admits that the said defendant is a corporation duly created by the laws of North Carolina, we will proceed at once to the consideration of the only question presented—whether an insolvent corporation may confess judgment, under the statute, to a director in the same, who is also a creditor.

There may have been a discussion at an earlier day as to the precise relation in which a director stands to the corporation of which he is an officer, whether an actual or a *quasi* trustee for the shareholders, and in case of the insolvency of the corporation, for the creditors also; but there can be no doubt that he occupies a fiduciary relation to the company, which, by virtue of his office, he represents in the management ¹⁷⁶ of its principal functions; neither can there be any doubt that the capital stock and property of the corporation, in case of its insolvency, constitute a fund, first, for the satisfaction of its creditors, and next for the shareholders. As is said by Mr. Justice Miller in *Sawyer v. Hoag*, 17 Wall. 610: "Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adopting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen."

As it is stated in 2 Story's Equity Jurisprudence, section 1252: "Perhaps to this same head of implied trusts upon presumed intention (although it might equally well be deemed to fall under the head of constructive trusts by operation of law) we may refer that class of cases where the stock and other property of private corporations is deemed a trust fund for the payment of the debt of a corporation, so that the creditors have a lien or right of priority of payment on it in preference to any of the stockholders in the corporation."

This doctrine was clearly stated by Mr. Justice Story in *Wood v. Dumer*, 8 Mason, 311, in 1824, and has been gener-

ally followed and announced in the treatises on this branch of the law ever since that time: 2 Morawetz on Private Corporations, sec. 780; 1 Beach on Private Corporations, sec. 116. And we are not without authority in our own court, for the same principle is very clearly stated in an interesting and able opinion of the late Mr. Justice Davis in *Marshall Foundry Co. v. Killian*, 99 N. C. 501, 6 Am. St. Rep. 539. This much being established, we may find the duty and liability of the director laid down in the very many and sometimes diverse decisions in the leading courts of this country. As ¹⁷⁷ he is selected and intrusted with the management of the affairs of the corporation, and has charge of its property and business, it applies to him; that "whenever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage": 1 Story's Equity Jurisprudence, sec. 323.

As a sequence to the foregoing propositions, we find "an insolvent corporation being indebted to its officers and directors; they executed the notes of the corporation in their own favor, and having obtained judgment by default issued execution thereon. In the distribution of the proceeds of the sheriff's sale of the personal property of the corporation: *Held*, That this conduct of the officers was a fraud in law which gave them no preference over general creditors in the distribution": *Hopkins' Appeal*, 90 Pa. St. 69, cited as an illustration under the head of Liability of Directors for Fraud: 1 Lawson's Rights and Remedies, sec. 343. In 17 American and English Encyclopedia of Law, at page 122, where many cases *pro* and *con* are cited, this principle is evolved from the weight of authorities: "It may be stated as a general rule that directors of an insolvent corporation cannot as creditors of such corporation secure to themselves a preference. They must share ratably in the distribution of the company's assets."

In 1 Beach on Private Corporations, section 241: "The directors of a company stand in the same relation toward creditors of the corporation that they do to its shareholders, being trustees for the benefit of corporate creditors also."

Mr. Justice Davis, in *Drury v. Cross*, 7 Wall. 299, speaking of the directors of a railroad company, says: "It was their duty to administer the important matters committed to their charge for the mutual benefit of all parties interested, and in

receiving an advantage to themselves not common to the other creditors, they were guilty of a plain breach of trust."

¹⁷⁸ It is true "that a director of a corporation is not prohibited from lending it moneys when they are needed for its benefit and the transaction is open and otherwise free from blame; nor is his subsequent purchase of its property at a fair public sale by a trustee under a deed of trust, executed to secure the payment of them, invalid: *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587. And there would be nothing to hinder a director from loaning money and taking liens upon the corporate property as security for its repayment, and in enforcing his lien, provided it was an open and entirely fair transaction, but even then it would be looked upon with suspicion, and strict proof of its *bona fides* would be required.

There are many decisions, however, which hold that, although directors are bound to discharge their duties prudently, diligently, and faithfully, and apply the assets, in case of insolvency, for the benefit of creditors instead of stockholders, yet they are not, technically, trustees, nor bound to apply the assets ratably among the general creditors. These decisions hold that they may not only make a preference between creditors, but such preference may be made in their own favor if they be creditors, and in such cases they must act with the utmost good faith: 17 Am. & Eng. Ency. of Law, 122, note. This doctrine was held in *Garrett v. Burlington Plow Co.*, 70 Iowa, 697, and in a note to this case in 59 Am. Rep. 466, a great many cases are cited, all holding the contrary doctrine to the case last named, and sustaining that to which we adhere. And although it appears from an examination of some of the cases cited in the American and English Encyclopedia on this subject, that there are very respectable and high authorities which would seem to relieve directors from the burden incident to their trust, we cannot hesitate to adopt the views which seem to us the most consistent with the virtuous exercise of the confidence reposed in them; and hold these fiduciaries to the duty which bids them put self-interest behind that of the creditors, who have ¹⁷⁹ not the same means of information which might enable them to protect themselves.

There are many cases cited in the brief of the plaintiff's counsel, and others found in the reports of the different states, which, for lack of decisions in North Carolina, are, to us, persuasive authority. The latest we have seen is that of the supreme court of Georgia, May 2, 1893, in *Lowry Banking Co.*

v. *Empire Lumber Co.*, 17 S. E. Rep. 968, where the proper distinction is made between a mortgage to a director of an insolvent corporation as an indemnity for liabilities already incurred, and one made in the execution or performance of an agreement or undertaking entered into at or prior to the time when the liability was incurred. It might be, in some instances, greatly to the benefit of the creditors and shareholders that directors should, in good faith, advance to the corporation funds, upon security, to enable it to carry out its undertakings.

To apply these principles to the case in hand, the defendant seems to be a corporation composed of but two persons or members, both of whom are necessarily officers and directors. The advantage to these persons in being erected into a corporation was, most probably, that they might thereby avoid, not to say evade, personal liability for the debts of the concern. It fails of success and becomes insolvent, which means that it owes more than its capital can pay. It holds a meeting, in which, of course, both of its members participate, and, by a unanimous vote, it orders the one to confess judgment in the name of the corporation to the other for a large amount of money "due by note." Will this transaction stand to the detriment of the other creditors of the corporation?

This is the first case of the kind which has come before this court for determination. It is an interesting and important question. By reason of the facility afforded by the statute for the formation of private corporations much of the ¹⁹⁰ business of the country and of this state is now being transacted through such agencies. They offer many advantages to the stockholders, and in some respects they are fraught with danger to the public, unless they are held within the bounds of law and equity. Here comes in the beneficence of that public policy which places all corporations under the visitation of the courts.

Can there be any essential difference between the principle as applied to a confession of judgment under the code and a mortgage? Most of the cases we have observed were those of mortgages to secure directors or other officers who were creditors of their own corporations. In the few cases which have come before this court under section 677 of the code, notably in *Davidson v. Alexander*, 84 N. C. 621, it has been held that on account of its liability to abuse, and for the pur-

pose of enabling other creditors to have the opportunity to make full investigation if they should so desire, the requirements of the statute should be strictly complied with. It will be observed that the case of *Sharp v. Danville etc. R. R. Co.*, 106 N. C. 308, 19 Am. St. Rep. 533, was the confession of judgment by a corporation to one of its officers, and under circumstances calculated to excite inquiry, if not suspicion, but the appeal was from an order made upon a motion to vacate the judgment, where only matters of irregularity could be considered. To attack the same for fraud it was necessary to bring an independent action, as has been done in this case.

The effect of a confession of judgment is more expeditious in securing a lien, and offers a more immediate means of securing payment of a debt by the issue of execution and sale of the corporate property than that given by a mortgage, for a mortgage made by a corporation cannot create a preference over antecedent creditors until a reasonable time after registration, which is notice, has been afforded them to protect their rights: Code, secs. 685, 1255. The preference is attempted to be reached by the confession ¹⁸¹ instead of by a mortgage. The preference in this case is to be avoided by whatever means it is sought. In holding that an insolvent corporation cannot prefer one of its directors, who is also a creditor, before other creditors, we are not at variance with the decision in *Blalock v. Kernersville Mfg. Co.*, 110 N. C. 99. The fourth head-note in that case is misleading when it says: "A corporation has the right to prefer a just debt to one of its officers to those of other creditors." The judgment was that the debt of this officer should be postponed until the other creditors had been paid.

The law is that where a corporation is insolvent its capital is a trust fund for the payment of its debts. A director creditor upon a debt theretofore existing cannot take advantage of his superior means of information to secure his debt as against other creditors.

Judgment affirmed.

CORPORATIONS.—THE DIRECTORS OF AN INSOLVENT CORPORATION CANNOT PREFER DEBTS DUE THEM, as they are trustees for the creditors of the corporation: *Olney v. Conanicut Land Co.*, 16 R. I. 597; 27 Am. St. Rep. 767, and note with the cases collected; *Beach v. Miller*, 130 Ill. 162; 17 Am. St. Rep. 291, and extended note. See further the extended note to *Garrett v. Burlington Plow Co.*, 59 Am. Rep. 466-471.

LILES v. ROGERS.

[113 NORTH CAROLINA, 197.]

SUBROGATION Is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the right of the creditors in relation to the debt. The ground of relief does not stand entirely upon the notion of mutual consent, either expressed or implied.

SUBROGATION.—PRIVITY IS NOT IN ALL CASES NECESSARY to entitle a party to subrogation, but he must have paid money upon request, or as a surety, or under some compulsion made necessary by the adequate protection of his own rights.

SUBROGATION BETWEEN SURETIES will not be enforced if there are several or successive obligations of suretyship which are not in substance and nature for the same thing, and have no relation to, nor operation upon, each other.

SUBROGATION.—IF AN OBLIGATION IN FAVOR OF A CREDITOR IS FULLY PAID AND DISCHARGED so that he can assert no further right under it, no other person can be subrogated to it.

SUBROGATION.—IF A PUBLIC OFFICER GIVES SEPARATE BONDS WITH SURETIES, one for the payment of the county taxes collected by him, and another for the payment of the state taxes so collected, and he uses moneys collected for county taxes in payment of moneys collected by him as state taxes, the sureties on his bond to the county cannot maintain a suit against the sureties on his state bond to compel them to repay the moneys thus paid into the state treasury out of the county taxes. The payment to the state treasurer satisfied the bond of the state, and therefore the sureties on the bond of the county cannot be subrogated to the rights of the state on the bond taken for its protection.

Jones, and Battle and Mordecai, for the plaintiffs.

Busbee and Busbee, Batchelor and Devereux, and J. C. L. Harris for the defendants.

108 **SHEPHERD, C. J.** This case comes before us on demurrer to the complaint, from which it appears that the defendant Rogers, as sheriff of the county of Wake, executed three bonds to the state, one conditioned upon the payment and collection of county taxes, one conditioned upon the payment and collection of state taxes, and the other conditioned upon the due execution of process, etc. It further appears that the sheriff, being engaged in the collection of said taxes, used a part of the money collected by him as county taxes in his settlement of the state taxes with the state treasurer, but it is not alleged that the state treasurer or the defendant sureties to the state tax bond had any knowledge whatever of the misapplication of the said money. This action is brought by the sureties on the county tax bond against the

sureties on the state tax bond, and the prayer is that the defendants be required to "refund" to the plaintiffs the sum of twenty-seven hundred dollars, the amount misapplied by the said sheriff.

Conceding for the purposes of the argument that the sheriff held the money in the character of a trustee, it is very plain that it cannot be followed into the hands of the defendant sureties, as it does not appear that any part of the said money ever came into their possession. In the absence, therefore, of any averment connecting them with the alleged breach of trust, their liability, if any, must result from their contractual relations with the state. It is only through this medium that the plaintiffs can look for relief, and hence it is insisted that they are entitled to recover upon the principle of subrogation.

¹⁹⁹ Subrogation is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt: Sheldon on Subrogation, sec. 1. The doctrine is distinctly a creature of equity, and the ground of relief does not stand entirely upon the notion of mutual consent, either expressed or implied: *Brinson v. Thomas*, 2 Jones' Eq. 414; 67 Am. Dec. 224; 1 Story's Equity Jurisprudence, 472; Beach's Modern Equity Jurisprudence, 797. The principle is applied where the person claiming its benefit has been compelled to pay the debt of a third person in order to protect his own rights or to save his own property. Accordingly it has been held that the sureties on the official bond of an insolvent sheriff, who had been compelled to pay money collected by a defaulting deputy, may recover of the sureties on a bond given to the sheriff by the deputy, conditioned upon the faithful performance of his duties: *Brinson v. Thomas*, 2 Jones' Eq. 414; 67 Am. Dec. 224. The doctrine applies also for the benefit of a purchaser who has extinguished an encumbrance upon the estate which he has purchased; of a co-obligor or surety who has paid the debt which ought to have been met by another, and in other cases of a similar character to be found in the reports and text-books. While it is true that privity is not in all cases necessary, still, to entitle one to relief he "must have paid the money upon request or as surety, or under some compulsion made necessary by the adequate protection of his own right": Beach's Modern Equity Jurisprudence, 801. It has therefore been held that if several or

successive obligations of suretyship be not in substance and nature for the same thing, and have no relation to, nor operation upon, each other, the doctrine of subrogation cannot be invoked: *Langford v. Perrin*, 5 Leigh, 552.

Tested by these general principles it would seem that the plaintiffs are not entitled to the relief prayed for, since it is not pretended that they or anyone pursuant to their directions have actually paid any money for the benefit of the ²⁰⁰ defendant sureties, or that by reason of their contractual obligations or otherwise they were in any manner compelled to do so. Extending to them, however, the doctrine insisted upon, let us consider whether it can aid them in the present action.

As soon as the surety has paid the debt, an equity arises in his favor to have all of the securities which the creditor holds against the principal debtor transferred to him, and to avail himself of them as fully as the creditor could have done. The securities referred to do not include those which are extinguished by the payment of the debt, such as the bond securing such principal debt, and unless the surety procures it to be assigned for his benefit to a third person, it is utterly extinguished, both at law and in equity, and he becomes a simple contract creditor: *Briley v. Sugg*, 1 Dev. & B. Eq. 366; 30 Am. Dec. 172; *Sherwood v. Collier*, 3 Dev. 380; 24 Am. Dec. 264; *Hodges v. Armstrong*, 3 Dev. 253; *Tiddy v. Harris*, 101 N. C. 589. And entitled to be subrogated only in respect to the collateral securities taken and held by the creditor: *McCoy v. Wood*, 70 N. C. 125. Indeed the whole doctrine of subrogation is predicated entirely upon the discharge of the original obligation: Sheldon on Subrogation, sec. 1; and Beach's Modern Equity Jurisprudence, 798. This principle is well established in this state, and is fully sustained by the English decisions prior to the enactment of the Mercantile Law Amendment Act, 19 & 20 Vict. Thus in *Copes v. Middleton*, 1 Turn. & R. 231, Lord Eldon said: "The general rule therefore must be qualified by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor. In the case, for instance, wherein, in addition to the bond, there is a mortgage with a covenant on the part of the principal debtor to pay the money, the surety paying the money would be entitled to say, 'I have lost the benefit of the bond, but the creditor has a mortgage, and I have a right to the benefit of the mortgaged estate

which has not got back to the debtor.'” So also Lord Brougham in ²⁰¹ *Hodgson v. Shaw*, 3 Mylne & K. 190, observes: “Thus the surety paying is entitled to every remedy which the creditor has. But can the creditor be said to have any specialty or any remedy on any specialty after the bond has gone by payment?” So it is said by Beach, *supra*, 811: “It was formerly (prior to the act above mentioned) the rule in England that a surety could have no right of subrogation to such securities as were extinguished by the payment of the debt, such as the bond securing the principal debt.”

While many of the American courts have conformed their rulings upon this subject to the principle declared by the act of Victoria, *supra*, this court and the courts of Alabama, Vermont, and perhaps other states, continue to follow the original doctrine as declared by the courts of England, the only modification of the rule in North Carolina being in favor of a surety who has paid the debt of a deceased principal: Rev. Code, c. 110; Code, sec. 2096. According to these principles the bond to which the defendants were sureties was discharged by the payment and settlement made with the state treasurer, and cannot be revived in favor of the plaintiffs.

It is further to be observed that the party for whose benefit the doctrine of subrogation is invoked and exercised can acquire no greater rights than those of the party for whom he is substituted, and if the latter had not a right of recovery the former can acquire none: Sheldon on Subrogation, sec. 6; *Clark v. Williams*, 70 N. C. 679. Could the state, after the settlement with the sheriff of the state taxes, have revived the liability of the defendants by refunding the money? The answer to this question depends upon whether the money could have been recovered of the state, and it is settled by abundant authority that, in the absence of notice of the misapplication, no such recovery could have been had. Where a trustee illegally transfers trust funds it is essential to their recovery that the person receiving them should have taken them with ²⁰² actual notice, or under such circumstances as would put him upon inquiry: *Bunting v. Ricks*, 2 Dev. & B. Eq. 130; 32 Am. Dec. 699; *Lockhart v. Philips*, 1 Ired. Eq. 342; *Gray v. Armistead*, 6 Ired. Eq. 74; *Polk v. Robinson*, 7 Ired. Eq. 235. In the present case there was no notice, either actual or constructive, and a settlement was made in consideration of the payment. This settlement had the effect of discharging the defendant sureties, and the state having, on

the faith of the payment, parted with its security, could have resisted a recovery. If this be so, it could not voluntarily refund the money and recover of the defendants. The state, therefore, having no right to recover of the defendants, there is nothing to which the plaintiffs can be subrogated.

Suppose the defendant Rogers had borrowed money from a bank, and given these defendants as sureties on the note, and when the note matured he had paid it with county funds in his hands, without the knowledge of the bank or of the defendants, could the sureties on the county tax bond of Rogers have recovered of sureties on the note which had thus been discharged? Very clearly not, and such a case differs in nothing, we think, from the case before us. This may appear to be very hard on the plaintiffs, but it is, we hear, a common practice for sheriffs to settle with the state out of the county tax funds, and it is better that sureties who assume such risks should suffer by reason of the unfaithfulness of their principals than that the court, in the effort to extricate them, should disregard well-settled principles and introduce uncertainty and confusion into the administration of the laws.

After a careful consideration of the case we are unable to see how this action can be maintained. The judgment of his honor, therefore, must be affirmed.

SUBROGATION—WHAT IS—PRIVITY, WHETHER NECESSARY.—Subrogation is the substitution of another person in the place of a creditor, so that the person substituted will succeed to all the rights of the creditor with reference to the debt due him. It is independent of any contractual relations, and includes every instance in which one party is required to pay a debt for which another is primarily answerable, and which in equity and good conscience ought to be discharged by the latter: *Johnson v. Barrett*, 117 Ind. 551; 10 Am. St. Rep. 83, and note; *Forrest Oil Company's Appeal*, 118 Pa. St. 133; 4 Am. St. Rep. 594, and note; *Emmert v. Thompson*, 49 Minn. 386; 32 Am. St. Rep. 566; *Spaulding v. Harvey*, 129 Ind. 106; 28 Am. St. Rep. 176, and note. See also the note to *Rowlett v. Grieve*, 13 Am. Dec. 227.

BORDEN v. RICHMOND AND DANVILLE RY. CO.

[118 NORTH CAROLINA, 870.]

CONTRACT—MISTAKE.—A PARTY TO A CONTRACT CANNOT AVOID it on the ground that he made a mistake where there had been no misrepresentation, and there is no ambiguity in the terms of the contract, and the other contractor has no notice of such mistake, and acts in perfect good faith. A unilateral error does not avoid a contract.

CONTRACT.—THE MISTAKE OF THE AGENT OF A RAILWAY CORPORATION in contracting to carry cotton at a price specified, caused by a telegram from his superior officer being incorrectly transmitted, does not entitle his principal to be released from the contract, nor from paying damages resulting from its breach.

ACTION to recover damages for the refusal of the defendant to ship five hundred bales of cotton for sixty-nine and one-half cents per one hundred pounds. The contract for such shipment was made by the defendant's local agent in consequence of a telegram received by him from his superior officer stating that such contract might be made at the rate specified, whereas the telegram as written stated the price to be eighty-nine and one-half cents. The plaintiff was not aware of the mistake in transmitting the telegram and acted in good faith in accepting the terms offered by it. The defendant asked that the jury be instructed that, because of the mistake, there was no coming together of the minds of the parties, and therefore no contract. This request was refused, and the jury found in favor of the plaintiff.

Haywood and Haywood, for the defendant.

575 BURWELL, J. It is conceded that the local agent of the defendant at Goldsboro made a written offer to ship for the plaintiff five hundred bales of cotton to Liverpool in November, 1891, and that the said agent was authorized to make such a proposal on the part of the defendant, and that plaintiff at once accepted this offer, his acceptance being also in writing. Furthermore, it seems to be conceded that the said agent plainly and unequivocally expressed what he understood to be the price to be charged by the defendant company for the transportation of the cotton, and there was no misunderstanding between the plaintiff and the agent as to any of the terms of the alleged contract.

Now it is evident that, if the agent is considered, not as the mere mouthpiece of the defendant corporation, through whom the intention of its higher officers in this matter was to be

simply communicated to the plaintiff, but as its authorized contracting agent—its *alter ego* in this affair—there was no error or mistake at all, much less one that would prevent the written proposal and its written acceptance from constituting a valid contract, by the plain terms of which each party would be bound. In this view of the matter there was no variance between the intention of the defendant and the ⁵⁷⁶ expression of that intention. The contracting agent expressed in unequivocal language exactly what he intended to express. The plaintiff accepted the offer thus made to him. The defendant cannot escape liability on this contract by asserting that its agent would not have so conducted himself if he had known at that time what he was afterwards informed of. And it might well be insisted on the part of the plaintiff that, in the absence of notice to the contrary, he had a right to assume that that agent had power to act for his principal in this matter, and that defendant should not be allowed to dispute that authority.

Passing by that question and assuming, for the sake of argument, that the local agent at Goldsboro was the mere mouthpiece or spokesman of the defendant in this matter, and that plaintiff knew this fact, then we have here a variance between the intention of the proposer (the defendant) and the expression of that intention. There was an error in the expression of the defendant's intention, but that error was unknown to the plaintiff. He had no good reason to suspect that the writing submitted to him did not correctly express the intention of the defendant. He did not "snap up" an offer which he knew or suspected was erroneously expressed. He merely accepted a plainly expressed proposition. In the view of the matter we are now taking, the question, then, is: If, in the expression of the intention of one of the parties to an alleged contract, there is error, and that error is unknown to and unsuspected by the other party, is that which was so expressed by the one party and agreed to by the other a valid and binding contract, which the party not in error may enforce? The law is well settled, says Mr. Lawson in his work on contracts, section 206, that a man is bound by an agreement to which he has expressed his assent in unequivocal terms, uninfluenced by falsehood, violence or oppression, and it judges of an agreement between two persons exclusively from those expressions of their intention which ⁵⁷⁷ are communicated between them. And Wharton,

in his work on the same subject, section 196, quotes from *Tamplin v. James*, L. R., 15 Ch. Div. 215, this general rule, as he denominates it: "Where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. But," he adds, "where a proposal evidently contains a mistake, an acceptor, by snapping at it, will not be permitted to take advantage of the mistake."

In section 202a he announces the rule thus: "A unilateral mistake of expression of one party cannot be set up by him as a ground for rescinding a contract or for resisting its enforcement, when his language was accepted by the other party in its natural sense. But when the blunder made by the proposer is obvious, an acceptor will not be allowed, by catching it up, to take an unfair advantage." An essential bilateral error as to the nature of a contract avoids it, if based upon such error, but a unilateral error will not have that effect: Bishop on Contracts, secs. 701 and 702. "It would open the door to fraud if such a defense was to be allowed. It is said that it is hard to hold a man to a bargain entered into under a mistake, but we must consider the hardship on the other side": *Tamplin v. James*, L. R. 15 Ch. Div. 215. We must consider also that "one of the remarkable tendencies of the English common law upon all subjects of a general nature is to aim at practical good rather than theoretical perfection, and to seek less to administer justice in all possible cases than to furnish rules which shall secure it in the common course of human business": 1 Story's Equity Jurisprudence, sec. 111.

We think, therefore, that all evidence in regard to plaintiff's purchase of the cotton was irrelevant. He had a valid contract for its shipment at sixty-nine and one-half cents. His rights thereunder could not be affected by a notice that the defendant's agent had been misinformed, as we have seen.

⁵⁷⁸ Hence, we need not consider the exception taken by the defendant to the admission or exclusion of evidence relating to that part of the controversy. Under the law, as we hold it to be, it being admitted that the plaintiff had been required to pay more than the contract price for the shipment of his cotton, he was entitled, as his honor held, to recover the difference between the sum so paid and the contract price.

Affirmed.

JUDGE CLARK dissented. He said that the evidence was not controverted, that the local agent did not have authority to quote freight rates, and that the general agent in Richmond in reply to an inquiry from the local agent quoted the rate of eighty-nine and one-half cents, but by some error in the transmission by telegraph, the message received by the local agent stated the rate to be sixty-nine and one-half cents, and he so informed the plaintiff; that if the defendant was liable for anything as a consequence of this mistake, it was only to the extent that the plaintiff had been misled and damaged by having acted upon it before the mistake was corrected; that as a matter of fact, it was corrected promptly and as soon as the defendant's general agent had notice of it. The judge summed up his final conclusions as follows: "Whatever damage the plaintiff sustained by the mistake in relaying the message, the principal, the defendant company, is liable for, but not for a breach of a contract, since that agent could not make a contract, if he had offered to do so, and certainly could not by making a mistake. In relaying the message he inadvertently took or transmitted six dots (. . . .), the telegraphic marks for six, instead of a dash and four dots (— . . .), the sign for eight. The mistake of a dash for two dots, was, so to speak, a *lapsus penne* on his part. It was no mistake on the part of the contracting agent. The learning about unilateral mistakes has, therefore, no bearing, for there was no mistake on either side to the contract. The two sides simply never agreed. The defendant offered eighty-nine and one-half cents, the plaintiffs thought they were accepting sixty-nine and one-half cents."

MISTAKE OF FACT IN CONTRACT—WHEN NOT RELIEVED FROM.—Ignorance of a stipulation in a contract is no ground for relief against the stipulation, where there is no evidence that the party was deceived or misled by any misrepresentation or concealment of the fact, and his mistake must be ascribed to his carelessness or inattention: *Robertson v. Smith*, 11 Tex. 211; 60 Am. Dec. 234; *Belt v. Mehen*, 2 Cal. 159; 56 Am. Dec. 329, and note; *Roundy v. Kent*, 78 Iowa, 662; *Chute v. Quincy*, 156 Mass. 189; *Serrell v. Rothstein*, 49 N. J. Eq. 385; *Juzan v. Toulmin*, 9 Ala. 662; 44 Am. Dec. 448, and note; *Perkins v. Gay*, 3 Serg. & R. 327; 8 Am. Dec. 653. See also the extended note to *Miles v. Stevens*, 45 Am. Dec. 631.

SELBY v. WILMINGTON AND WELDON RAILWAY CO.

[113 NORTH CAROLINA, 568.]

CARRIERS OF LIVESTOCK MAY CONTRACT WITH SHIPPERS THAT, AS A CONDITION PRECEDENT to their right to recover damages for loss or injury to such stock, they will give notice in writing of their claim, to some officer of the company, or its nearest station agent, before such stock shall be removed from the place of destination, or from the place of delivery of the same, and before such stock is mingled with other stock.

CARRIER OF LIVESTOCK IS NOT REQUIRED TO HAVE VEHICLES STRONG ENOUGH to withstand the struggles of unruly and vicious stock. It is sufficient for the carrier to furnish cars suitable for the safe conveyance of ordinary animals of the class contracted to be conveyed.

ACTION for damages for injuries to livestock while being transported on the defendant's cars. By defendant's bill of

lading it was stipulated that the plaintiff, in consideration of reduced rates for transportation, agreed to assume the risks of the animals being wild, unruly, or weak, or maiming by each other or themselves, and that plaintiff would, as a condition precedent to his right to recover any damages for loss or injury to his stock, give notice in writing of his claim, to some officer of the company, or its nearest station agent, before the removal of the stock from the place of destination mentioned in the bill of lading, or from the place of delivery to the shipper, and before the stock is mingled with other stock. The court charged the jury that, it was the common-law duty of the carrier to safely carry and deliver freight, and nothing would excuse this duty, except the act of God or the public enemy; that this duty, however, might be waived by special contract, provided its provisions were reasonable and proper, but that the provisions requiring the notice of the claim of loss to be given in writing before the removal of the stock or their mixture with other stock was not reasonable, and was therefore void. Also that it was the duty of the defendant to furnish good and safe cars for the transportation of the stock, and that if it failed to do so it was liable; that it was required to furnish a car that would resist the pawing of animals confined in it, and also their kicking, and was liable if it failed to do so, notwithstanding the special contract entered into with the plaintiff. The court further instructed the jury that it was the duty of the company to provide suitable cars for transporting livestock, which must be of sufficient strength to resist the struggles of the stock, and that the defendant was liable for the loss occasioned by its neglect in this regard, though the animals were vicious and unruly, because it was within the defendant's power to provide cars which were actually and absolutely sufficient. Verdict and judgment for the plaintiff. Defendant appealed.

S. A. Woodard, for the plaintiff.

C. B. Aycock, for the defendant.

see BURWELL, J. The relation between the parties to this action is not that of a common carrier towards a shipper of freight who had chosen to pay the usual tariff charges, and stand upon his rights, and hold the carrier to the performance of his duty under all the strict requirements of the common law. It was his privilege to demand of the carrier the shipment of his stock under those somewhat stringent but not

unjust conditions. He has chosen not to avail himself of this privilege, and thus put his animals under the safeguard ⁵²⁴ established by the law for the protection of those whose property comes to the possession of a common carrier for transportation, but rather, for a valuable consideration, to waive this right of privilege, and allow the defendant to assume simply the relation of a carrier of stock under a special contract which, no fraud or imposition being alleged, must be interpreted according to the ordinary rules of construction, and its provisions enforced, unless they are unreasonable and unjust—"if they are not in conflict with sound legal policy": *Express Co. v. Caldwell*, 21 Wall. 264.

Among other stipulations contained in the contract was one by which the plaintiff agreed, in consideration of the reduced rates granted "as a condition precedent to his right to recover any damages for loss or injury to said stock," that he would "give notice in writing of his claim thereof to some officer of said company or its nearest station agent before said stock is removed from the place of destination above mentioned, or from the place of the delivery of the same to said party of the second part, and before such stock is mingled with other stock." It seems to us that this condition, imposed upon the plaintiff by a contract of his own making, founded upon a valuable consideration moving to him, contravenes no sound legal policy, and is not unreasonable. It is not in any sense a stipulation that the defendant carrier shall be exempted from the effects of its negligence or the negligence of its servants in the performance of those duties towards the plaintiff assumed in the contract; nor is it a requirement that any injury that has been done to plaintiff's stock while in defendant's care under the terms of the bill of lading shall be adjusted in the presence of an officer of the defendant company before the property is removed from the station, and hence the case of *Capehart v. Seaboard etc. R. R. Co.*, 81 N. C. 438, 81 Am. Rep. 505, has no application here. We have no stipulation at all as to the fixing of the amount of damage done to plaintiff's property, but simply an agreement that he will, ⁵²⁵ when about to take his animals from the cars or yard of the defendant, notify the company in writing, if, upon a reasonable examination, he is able to detect any damage done them. Owing to the nature of the property intrusted to the carrier, the difficulty of identifying each animal, and the terms of the contract as regards such damage

as might be inflicted by the animals on one another, or might come to them without any fault on the part of the defendant, it seems to us indeed very reasonable that the defendant's agents should have an opportunity then and there to examine the stock and ascertain, if they can, the cause and the extent of the damage. We have been cited to no authority which, upon examination, seems to hold that such requirement, under the circumstances, is unreasonable. *Rice v. Kansas Pac. Ry. Co.*, 63 Mo. 314; *Goggin v. Kansas Pac. Ry. Co.*, 12 Kan. 416, and other cases, seem fully to sustain the view we take of the matter, and to show that there was error in the charge that the stipulation was not reasonable, and was void.

It is stated in the case that his honor gave the jury the following instruction, which was excepted to: "It is the duty of the defendant company to provide suitable cars for transporting livestock. The car must be sufficiently strong to resist the struggles of the stock, and the company is liable for loss occasioned by its neglect in this regard, in spite of the fact that the animals are vicious and unruly, upon the principle that it is within its power to provide those which are actually and absolutely sufficient."

There was error here also, we think, for while it may be the duty of a carrier that undertakes to ship livestock to provide cars strong enough to safely transport animals that are ordinarily unruly, the law does not impose upon it so hard a task as to detect that some of them are vicious, and act accordingly. The vehicle must be suitable for the safe conveyance of ordinary animals of the class. It is not required that it shall be strong enough to withstand the ~~see~~ struggles of some of that class that may be not only unruly but vicious.

As there must be a new trial for the error mentioned, we omit consideration of other exceptions taken by defendant.

New trial.

CARRIERS OF LIVESTOCK—DUTY TO FURNISH SUITABLE CARS.—A railroad company undertaking to transport livestock is bound to furnish suitable and safe cars, and is responsible for any loss arising from a neglect of duty in this particular: *Peters v. New Orleans etc. R. R. Co.*, 16 La. Ann. 222; 79 Am. Dec. 578, and note. It is bound to furnish cars of sufficient strength to prevent the animals breaking through the same, and is liable for failure to do so, though the animals were unruly or vicious: *Smith v. New Haven etc. R. R. Co.*, 12 Allen, 531; 90 Am. Dec. 166, and note. See further discussion of this subject in the extended note to *Clarks v. Rochester etc. R. R. Co.*, 67 Am. Dec. 211, 215, and *Hawkins v. Great Western R. R. Co.*, 17 Mich. 57; 97 Am. Dec. 179. But the following line of cases holds that carriers of live-

stock are relieved from liability for injuries resulting from the natural propensity of animals to injure themselves or one another: *Mynard v. Syracuse etc. R. R. Co.*, 71 N. Y. 180; 27 Am. Rep. 28, and note; *Bamberg v. South Carolina R. R. Co.*, 9 S. C. 61; 30 Am. Rep. 13; *Evans v. Fitchburg R. R. Co.*, 111 Mass. 142; 15 Am. Rep. 19; *Clarks v. Rochester etc. R. R. Co.*, 14 N. Y. 570; 67 Am. Dec. 205, and extended note; *Boehl v. Chicago etc. Ry. Co.*, 44 Minn. 191; *Louisville etc. Ry. Co. v. Bigger*, 66 Miss. 319; *Railway Co. v. Wynn*, 88 Tenn. 320; *Gulf etc. Ry. Co. v. Trawick*, 80 Tex. 270; *Agnew v. Steamer Contra Costa*, 27 Cal. 425; 87 Am. Dec. 87, and note. See the extended notes to *Rixford v. Smith*, 13 Am. Rep. 53, and *Kansas etc. Ry. Co. v. Nichols*, 12 Am. Rep. 502.

CARRIERS OF LIVESTOCK—NOTICE OF CLAIM.—A railroad company and a shipper of livestock may contract that as a condition precedent to his right to recover damages for injury to his stock, the shipper must give notice in writing to some officer of the company or its nearest station agent before the removal of such stock from the place of delivery: *Atchison etc. R. R. Co. v. Temple*, 47 Kan. 7.

WHITE v. NORTHWESTERN NORTH CAROLINA RAILROAD COMPANY.

[113 NORTH CAROLINA, 610.]

MUNICIPAL CORPORATIONS—PUBLIC STREETS.—THE PRESUMPTION as to public streets is that the city has an easement only, and that the fee thereof is vested in the abutting owner.

PUBLIC STREETS.—AN ABUTTING OWNER of lands fronting upon a public street is entitled to every right and advantage in that part of the street in which he owns the fee, not required by the public. The easement of the public is the right to use and improve the street for the purposes of a highway only.

PUBLIC STREETS.—THE USE OF A STEAM RAILWAY UPON A PUBLIC STREET is a perversion of the street from its original and proper public purposes. An abutting owner is entitled to recover damages for the construction and use of a steam railway in the street, though it is licensed by the municipal authorities.

PUBLIC STREETS, USES TO WHICH MAY BE PUT.—The owner of land abutting upon a public street, whether he owns the fee of the street or not, has the right to have the street used for proper purposes only, and because the operation of a steam railway therein is not such a purpose, may recover for such operation. Whether he or his predecessors in interest dedicated such land or granted it for street purposes, or whether it was acquired for such purposes by proceedings in the exercise of the power of eminent domain, is not material.

PUBLIC STREETS.—AN ABUTTING OWNER, WHETHER THE FEE IS IN HIM OR IN THE MUNICIPALITY, has certain proprietary rights of which he cannot be deprived, even under authority of the legislature, without compensation. If the enjoyment of his private rights in the streets is impaired by the perversion of the street to uses for which it was not intended, and which the public right does not justify, and his property is thereby injured and its value impaired, he may maintain an action to recover such damages as he may have suffered.

ACTION to recover damages for injuries resulting from the construction and operation of a steam railway in a street in front of plaintiff's property in the city of Winston. Judgment for the defendant; plaintiff appealed.

E. B. Jones, for the plaintiff.

Glenn and Manly, for the defendant.

611 **SHEPHERD, C. J.** The plaintiff is the owner of a lot abutting upon one of the streets of the city of Winston, and brings this action to recover damages for various injuries to her said property, inflicted by the defendant by reason of its having entered upon and constructed its railroad through the said street.

612 It appears from the complaint that, prior to the plaintiff's purchase of the property in 1879, the street had been "located and opened for the use and benefit of plaintiff and others, and the public generally who owned property north of Liberty street, which was almost inaccessible by or over any other street." It also appears that in the construction of its road the defendant made an excavation in front of said property two hundred and twenty-three feet in length, and thirty-five or forty feet in depth and width, and thereby reduced the width of the street from thirty to eighteen feet. It is further alleged that by "reason of the nature of the soil and the proximity of the cuts, travel along the said street is rendered dangerous, and that in order to sustain the width of the same fifteen to eighteen feet, the defendant has put in pillars or posts to hold or retain the earth composing the street in position, which plaintiff alleges is insecure and unsafe, and liable to destroy and render useless the said street." It is furthermore alleged that by reason of such excavation and occupation by the defendant, the street, at certain points along the line of plaintiff's property, is almost entirely destroyed, and that plaintiff is greatly endamaged. These allegations extracted from the complaint must, for the purpose of the appeal, be taken as true, as no evidence seems to have been introduced on the trial, and his honor rejected the issue as to the alleged damages sustained by the plaintiff, on the ground that the defendant "had a license from the city to construct its road and use the street, if necessary."

The questions presented, therefore, are whether, as against the abutting owner, the city can authorize the use of its streets for the purposes of an ordinary steam railroad, and whether

such abutting owner has any proprietary rights for the violation of which she can maintain an action.

It does not appear how the city acquired its title to the street in question, nor do we learn from the record whether it owns the fee in the soil or simply an easement therein. In ⁶¹³ the absence of evidence, however, the presumption is that the city has an easement only, and that the fee remains in the abutting proprietor: *Elliott on Roads and Streets*, 110; *Rich v. Minneapolis*, 37 Minn. 423; 5 Am. St. Rep. 861; 3 Kent's Commentaries, 432. In such a case "the abutting owner is entitled to every right and advantage in that part of the streets of which he owns the fee not required by the public. The easement of the public is the right to use and improve the street for the purposes of a highway only": *Lewis on Eminent Domain*, 113. It must follow, therefore, that if the city perverts the streets to illegitimate purposes, it is an interference with the proprietary rights of the abutter, and that he is entitled to relief at the hands of the courts.

This introduces us to the very important question, never before passed upon by this tribunal, whether or not the use of a steam railroad is a perversion of the street from its original and proper public purposes. There has been much discussion and not a little conflict of judicial decision upon this subject, but it is believed that the weight of authority greatly preponderates in favor of the affirmative view of the proposition. Judge Dillon, after a careful investigation, states his conclusion as follows: "The weight of judicial authority undoubtedly is that where the public have only an easement in the streets, and the fee is retained by the adjacent owner, the legislature cannot, under the constitutional guarantee of private property, authorize an ordinary steam railroad to be constructed thereon, against the will of the adjoining owner, without compensation to him. In other words, such a railway as usually constructed and operated is an additional servitude": 2 *Dillon's Municipal Corporations*, 725. In *Mills on Eminent Domain*, section 204, the same doctrine is laid down, and it is said: "The legislature may authorize the use of a street by the railroad, so as to make the entry lawful, but the use is an additional burden, and the right will not become fixed in the company until compensation is made. If no ⁶¹⁴ remedy is provided, there is remaining the remedy at common law."

In *Lewis on Eminent Domain*, section 111, the able and

discriminating author remarks: "To us it seems so clear that a railroad is foreign to the legitimate uses of a highway that we never have been able to understand how a court could reach a contrary conclusion." After stating that highways have from time immemorial been devoted to the common use of every citizen, and that no one had a private right or any exclusive privilege therein, the author proceeds: "The railroad does not fall within the scope of such uses. It requires a permanent structure in the street, the use of which is private and exclusive. It gives to an individual or corporation a franchise and easement in the street inconsistent with the public right. To hold that a railroad is one of the proper and legitimate uses of a street leads to the absurd consequence that a street might be filled with parallel tracts, which would practically exclude all ordinary travel and still be devoted to the ordinary uses of a highway. The law ought not to tolerate such a consequence."

In Elliott on Roads and Streets, 528, the author cites many authorities, and concludes by saying that the weight of authority is that such an appropriation of a street is "a new and additional burden," for which the abutter is entitled to compensation.

In support of his proposition he quotes the following language of Judge Cooley: "Neither can the use of the highway for the ordinary railway be in furtherance of the purpose for which the highway is established, and a relief to the local business and travel upon it. The two uses, on the other hand, come seriously in conflict. The railroad constitutes a perpetual embarrassment to the ordinary use, which is greater or less in proportion to the business that is done upon it and the frequency of trains. When, therefore, the country highway or the city street is taken for the purposes ⁶¹⁵ of a railroad company engaged in the business of transporting persons and property between distant points, the owner of the soil in the highway is entitled to compensation, because a new burden has been imposed upon his estate, which affects him differently from the original easement, and may be specifically injurious": *Constitutional Limitations*, 3d ed., 683.

In Hare's American Constitutional Law, 361, the foregoing doctrine is fully approved, and it is said: "It is immaterial as regards the principle whether the land is given voluntarily or taken under the right of eminent domain. If the owner dedicates the land, it is for the continuing uses of a street.

If it is condemned, such also is the end in view. To convert a common highway over a man's land into a railroad is therefore to impose an additional burden upon the land, which greatly impairs its value, considered as a whole; and if the owner is not compensated his consent must be proved. It cannot be said with truth that, in assenting to the laying out of the highway upon his land, he consented to the building of a railroad upon it, because they are essentially different. The one benefits his land, renders access to it easy, and enhances the price, while the other makes access to it difficult and dangerous, and renders it comparatively valueless. Nor can it be justly contended that a railway is merely an improved highway. . . . Were the transaction between individuals, every one would see the injustice of such a conclusion. The doubt arises from the supposition that the public interest is involved; and it was to guard against the bias arising from this source that the constitution interfered to protect the citizen. It follows that the dedication of land as a street does not preclude the owner from bringing trespass or ejectment, or obtaining an injunction against a railway company which is about to enter upon and occupy the way, and that the company cannot (in the absence of the exercise of the right of eminent domain) rely upon a grant from the legislature and the license or consent of the municipality as a justification."

616 Booth, in his work on Street Railways, section 78, after stating that, in the early history of commercial railroads, the current of authority was contrary to the views above stated, remarks: "But, according to the weight of judicial opinion, as expressed during the last thirty years, where the fee of the street remains in the adjoining owner, such use is inconsistent with the purposes of the original acquisition, and, without compensation, can only be acquired by the exercise of the power of eminent domain."

In the discussion of the question, we have preferred to reproduce the conclusions of eminent text-writers rather than attempt a review of the numerous decisions upon which they are founded. These decisions, and others we could cite, fully establish, upon principle and by weight of authority, the proposition that, where the public have only an easement in the street, and the fee of the soil of the street is retained in the abutting owner, a steam railroad cannot, under the constitutional guaranty of private property, be lawfully constructed and operated thereon against his will and without

compensation: *Grand Rapids etc. R. R. Co. v. Heisel*, 47 Mich. 398; *Southern Pac. R. R. Co. v. Reed*, 41 Cal. 256; *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249; 68 Am. Dec. 392; *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546; *Daly v. Georgia etc. R. R. Co.*, 80 Ga. 793; 12 Am. St. Rep. 286; *Cox v. Louisville etc. R. R. Co.*, 48 Ind. 178; *Kucheman v. C. C. & D. Ry. Co.*, 46 Iowa, 366; *Indianapolis etc. Ry. Co. v. Hartly*, 67 Ill. 489; 16 Am. Rep. 624; *Phipps v. West Maryland R. R. Co.*, 66 Md. 319; *Springfield v. Connecticut River R. R. Co.*, 4 Cush. 68; *Harrington v. St. Paul etc. R. R. Co.*, 17 Minn. 215; *Hastings etc. R. R. Co. v. Ingalls*, 15 Neb. 123; *Chamberlin v. Elizabethport Steam Cordage Co.*, 41 N. J. Eq. 43; *Lawrence R. R. Co. v. Williams*, 35 Ohio St. 163; *Ford v. Chicago etc. R. R. Co.*, 14 Wis. 609; 80 Am. Dec. 791; *Carl v. Sheboygan etc. R. R. Co.*, 46 Wis. 625; *Buchner v. Chicago etc. Ry. Co.*, 60 Wis. 264; *Indianapolis etc. R. R. Co. v. McAhren*, 12 Ind. 552; *Theobald v. Louisville etc. R. R. Co.*, 66 Miss. 279; 14 Am. St. Rep. 564; *Barney v. Keokuk*, 94 U. S. 324; *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644.

617 The principle, then, being established that the use of a street for steam railroads is not a legitimate use of the street for public purposes, it must of course follow that the city had no right, in the exercise of its usual and ordinary powers relating to its highways, to authorize the entry and occupation of the same by the defendant, and that the bare license of the city can afford no justification for the infringement of the rights of the plaintiff. The plaintiff, therefore, taking her allegations to be true as to the damage inflicted upon her property, very plainly has a cause of action against the defendant.

If, however, we are wrong in the assumption that the plaintiff is the owner of the fee in the said street, and if it should appear upon another trial that the city has acquired it, either by dedication, grant, or condemnation, it will be necessary to determine whether the plaintiff has an easement in said street to the extent that it shall be used only for street purposes, and whether her rights are "property rights," which cannot be impaired or destroyed except under the exercise of the right of eminent domain.

Distinctions based upon the legal ownership of the fee in respect to the rights of the abutting proprietor have produced much confusion, resulting in many conflicting decisions; but the true principle which has been slowly, but surely, evolved

from protracted discussion and experience is that, in respect to the use of the soil for the purpose of a street (and apart from those reversionary or other rights peculiar to legal ownership), it is wholly immaterial where the legal title resides. The very power to take private property for public use, as well as the capacity of a municipal corporation to acquire it in any way, necessarily implies that it is to be held in trust for public purposes, and in the case of land acquired for the purposes of a street, there is something in the nature of a contract, under which two co-existent and inviolable rights are created; one belonging to the public, to use and improve the street for the ordinary purposes of a street; the other, to the abutting owner to have access to and from his property, and to enjoy such use of the street as is customary and reasonable. If the owner voluntarily dedicates or grants a strip of land to a city for a street, it must be presumed that he does so in consideration of the contemplated benefits accruing to his adjoining property by reason of the strip being used for the legitimate purposes of a street only. If the grant be made upon a pecuniary consideration it is also fair to assume that, in estimating the amount to be paid, the value of the benefits above mentioned were likewise considered. In such cases, says Mr. Lewis, section 114: "To make the right a part consideration of the grant, and then allow the public to invade or destroy it at pleasure, would be a fraud which the law will neither impute or allow. Therefore, in the case of such a grant there arises by operation of law a private right to use the street in connection with the lot of the proprietor, which is as inviolable as any other right of property." So, if the city acquired the land by condemnation, such advantages or benefits to the adjoining property are usually assessed at a fixed value, and deducted from the estimated damages, and it would, says the above author, be "the grossest iniquity to compel a man to pay for advantages, whether in the form of deductions from the price to be paid or of an assessment of benefits, unless those advantages are secured to him by a clear title. . . . The existence of these private rights and easements is strictly independent of the mode in which the highway is established, or of the estate or interest which the public acquires in the soil of the street."

The true principles applicable to this question have been declared by the court of appeals of New York in *Story v. New York Elevated R. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146, and

Lahr v. Metropolitan Elevated Ry. Co., 104 N. Y. 268. These cases have been followed by subsequent decisions of other states, and their doctrine has been approved by the most prominent writers upon the ⁶¹⁰ subject. The opinions are very elaborate, and we cannot do better than to adopt Judge Dillon's summary of some of the principles enunciated.

"These judgments, and those that follow them, rest upon the foundation principle that whether the fee in the street is in the abutter, subject to the rights of the public, that is, to the paramount rights of the public for street uses proper; or whether the fee is in the public for street uses proper, in either case, and generally in both cases, the abutter is entitled to the benefit of the street for all uses except street uses proper, subject, of course, to legislative and municipal regulations; and that such rights are property or property rights in the abutter, which can only be taken away by the legislature on the condition of making compensation. And the abutting owner's rights in the street are not affected by the source from which he derives his title. . . . If the abutter owns the fee of the street, his rights may be said to be legal in their nature. If he does not own the fee, those rights are in the nature of equitable easements in fee, the soil of the street being the servient, the abutting owner's lot being the dominant, tenement. Among the most important of such rights or easements is the abutter's right to access, to light and to air. The court accordingly held that, so far as the elevated railway structures interfered with such rights or easements, while the legislature might authorize their erection and use, yet this could only be done as respects the abutter by the exercise of the right of eminent domain, viz., on condition of making compensation to the abutting owner for the damage which his property actually sustained."

"The result of the author's reflections upon this subject is that the views of the court of appeals are sound and just, sound, because they recognize the paramount nature of the public right to put the street to this new and necessary form of public use; just, because they recognize and declare that the abutter has special proprietary rights or easements in ⁶²⁰ their nature, he is not called upon unequally to sacrifice without compensation for the public use. In effect, the court says the true doctrine is 'take but pay'": 1 Hare's American Constitutional Law, 370, 375; Lewis on Eminent Domain, secs. 114, 115; Booth on Street Railways, sec. 81; *Barney v.*

Keokuk, 94 U. S. 324; *St. Paul R. R. Co. v. Schurmier*, 7 Wall. 272; 1 Rorer on Railroads, 524; *Story v New York Elevated R. R. Co.*, 90 N. Y. 122; 43 Am. Rep. 146; *Haynes v. Thomas*, 7 Ind. 38; *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546; *Theobald v. Louisville etc. R. R. Co.*, 66 Miss. 279; 14 Am. St. Rep. 564.

The contrary view, laid down in 2 Wood's Railway Law, 727, seems to be based upon the restricted interpretation of the word "taken," it being applied by some of the courts only to property actually taken and occupied, and all incidental damages to adjoining proprietors are regarded as "consequential" in their character and *damnum absque injuria*. The learned author admits that such would not be the case if the words used were "taken or damaged"; but by a reference to the opinion in *Staton v. Norfolk etc. R. R. Co.*, 111 N. C. 278, it will appear from the cases cited that this restricted meaning of the word "taken" is not in accord with the more recent and better authorities, and is being rapidly submerged by the steady and increasing current of judicial decision: *Lewis on Eminent Domain*, 58; *Pumpelly v. Green Bag Co.*, 13 Wall. 166; *Eaton v Boston etc. R. R. Co.*, 54 N. H. 504; 12 Am. Rep. 147.

The result of the numerous authorities is that in either view of the case, that is, whether the fee is in the plaintiff or in the city, the plaintiff has certain proprietary rights, of which she cannot be deprived, even under the authority of the legislature, without compensation. If her property is in any way injured by the use of the street for legitimate purposes, she cannot complain. But if the enjoyment of her private rights in the street is interrupted by a perversion of the street to uses for which it was not intended, and which the public right does not justify, and her property is thereby injured and its value impaired, she may maintain an action ⁶³¹ and recover such damages as she may have sustained. These proprietary rights in the use of the street for proper public purposes are practically, as we have seen, the same, irrespective of the ownership of the soil, and are not confined to the mere right of access, since this may not be disturbed, although the street may be reduced in width to ten or fifteen feet.

This view is well sustained in the leading case of *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 293; 12 Am. St. Rep. 650, in which the court said: "Take a case in one of the states where the fee of the street is in the state or municipality, and of a street sixty feet wide. The abutting lot-owners have paid for

the advantages of the street on the basis of that width, either in the enhanced price paid for their lots, or, if the street was established by condemnation, in the taxes they have paid for the land taken. In such a case, if the state or municipality should attempt to cut the street down to the width of ten or fifteen feet, would it be an answer to objection by lot-owners that the diminished width would be sufficient for mere purposes of access to their lots? It would seem as though the question suggests the answer." The interest of the abutting owner in the entire width of the street, subject to the proper uses of the public, upon the authority of the above decision, has been declared by this court in *Moose v. Carson*, 104 N. C. 431; 17 Am. St. Rep. 681, and cannot be regarded as an open question. See also *Haynes v. Thomas*, 7 Ind. 38. If then the value of the property is lessened by reducing the width of the street, or if such damage is caused by excavations rendering it unsafe and dangerous, as stated in the complaint, the plaintiff is entitled to recover.

It will be observed that the defendant did not introduce its charter or show that it had condemned any part of the street or the rights or easement of the abutting proprietor. It justifies its conduct solely upon the mere license of the city of Winston, and in this view of the case its occupation, in so far as it affects the plaintiff, must be regarded as unlawful. ⁶²² If this be so, the plaintiff may maintain a common-law action for damages, to be assessed up to the time of the trial, or it seems she may sue for the permanent damage, if any, which has been inflicted upon her property by reason of the location and construction of the defendant's road, and by so doing confer upon the defendant (so far as she is concerned) an easement to occupy the street. Had the defendant entered under some statutory authority, it would be important to consider whether the plaintiff would not be confined to the statutory remedy, but as it does not appear to have entered under any other authority than the bare unauthorized license of the city, and as the ruling of the court is based expressly upon the validity of such license, we must conclude that the plaintiff has a right to maintain the present action, and that the issue as to the damages actually sustained should have been submitted to the jury.

As the facts were not fully developed on the trial, we do not deem it proper to further pursue the discussion.

New trial.

ABUTTING OWNERS—RIGHTS OF—COMPENSATIONS FOR RAILROADS IN PUBLIC STREETS.—This question in its various phases will be found thoroughly discussed in *Gass etc. Mfg. Co. v. St. Louis etc. R. R. Co.*, 113 Mo. 308; 35 Am. St. Rep. 706; *Jones v. Erie etc. R. R. Co.*, 151 Pa. St. 30; 31 Am. St. Rep. 722, and the notes thereto where the cases are collected, and the extended note to *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 612-616.

STATE v. LEE.

[113 NORTH CAROLINA, 681.]

A PEDDLER IS AN ITINERANT VENDOR OF GOODS who sells and delivers the identical goods he carries with him. One who sells by sample, taking orders for goods to be thereafter delivered, and to be paid for wholly or in part upon subsequent delivery, is not a peddler.

PROSECUTION for peddling goods without first procuring a license. The defendant was acquitted, and the state appealed.

The Attorney General, for the state.

G. S. Ferguson, for the defendant.

683 **CLARK, J.** Whether the taxing of the occupation of selling "clocks, stoves, or ranges," by sample, under the state of facts found by the special verdict in this case, and whether to do so would be an interference with interstate commerce, is an interesting one. There are cases which would seem to indicate that the state could lawfully collect such tax upon the facts here found to exist, if the legislature had seen fit to impose it: *Machine Co. v. Gage*, 100 U. S. 676; *State v. French*, 109 N. C. 722; 26 Am. St. Rep. 590. But we need not and do not pass upon that point.

The tax, for the failure to pay which the defendant is on trial, is that which is levied by section 28, chapter 294, Acts of 1893, which provides: "On every itinerant person or company peddling clocks, stoves, or ranges, fifty dollars annually on each wagon (if wagons are used) in each county where he or they may peddle. If wagons are not used, the tax shall be paid on each agent." The special verdict finds that the defendant sold the ranges by a sample range which he carried around in his wagon, and that he "did not sell any sample range." The tax is laid only on "peddling," and the defendant did not peddle his ranges. The usual and ordinary significance of that word indicates the occupation of an itinerant vender of goods, who sells and delivers the identical goods he

carries with him, and not the business of selling by sample and taking orders for goods to be thereafter delivered, and to be paid for wholly or in part upon their subsequent delivery. Webster's International Dictionary defines "peddle, to sell from place to place; to retail by carrying around from customer to customer; to hawk; hence, to retail in very small quantities." Also, "to travel about with wares for sale; to go from place to place or from house to house for the purpose of retailing goods; as, to peddle without a license." ^{ess} Worcester defines it simply "to carry about and sell; to retail as a peddler." To the same purport are the other dictionaries.

As the defendant did not "carry about and sell" the ranges, but sold only by sample, he did not violate the statute by failure to pay the tax upon the business of "peddling ranges."

No error.

PEDDLERS—WHO ARE.—A peddler is an itinerant individual ordinarily without local habitation or place of business, who travels about with merchandise for the purpose of selling it: *City of Davenport v. Rice*, 75 Iowa, 74; 9 Am. St. Rep. 454; *Emmons v. Lewiston*, 132 Ill. 380; 22 Am. St. Rep. 540, and note. One who goes from place to place in a state soliciting the sale of and selling sewing-machines, which are made by, and are the property of, a citizen of another state, is a peddler: *State v. Emert*, 103 Mo. 241; 23 Am. St. Rep. 874, and note. And to the same effect is *Commonwealth v. Gardner*, 133 Pa. St. 284; 19 Am. St. Rep. 645, and note. One who goes from place to place with a sample stove carried upon a wagon to exhibit the sample and procure orders, which his employer afterwards fills by delivering through other agents, is a peddler within the meaning of the code of Georgia: *Wrought Iron Range Co. v. Johnson*, 84 Ga. 754. See the extended note to *Grafty v. Rushville*, 57 Am. Rep. 136, 137.

CASES
IN THE
SUPREME COURT
OF
OREGON.

WOOD v. LOST LAKE MANUFACTURING COMPANY.

[28 OREGON, 20.]

CORPORATIONS—SALARY OF OFFICERS.—A director in a corporation acquires no legal claim against it for services performed by him in the discharge of duties pertaining to the office, unless a compensation therefor is fixed by resolution or by-law of the corporation prior to their performance, nor will the auditing and approval of such unauthorized claim by the auditing officers of the corporation impart to it any validity.

CORPORATIONS—RIGHT OF DIRECTOR TO COMPENSATION.—FOR SERVICES PERFORMED by a director for the corporation at its instance and request, in regard to matters outside of the duties devolving upon him by virtue of his office, he is entitled to claim compensation upon a *quantum meruit*, although his compensation has not been fixed by the corporation prior to the performance of the services.

THE Lost Lake and Columbia Manufacturing Company, a corporation organized for, and carrying on, a lumber business, made an assignment for the benefit of creditors, on September 22, 1887. This assignment was made at a special meeting of the board of directors held on the day mentioned. T. A. Wood, who was a shareholder and president of the board of directors, presented a bill for salary amounting to four thousand eight hundred dollars, and on motion the bill was ordered paid. This claim was afterwards allowed by the assignee, but certain creditors of the corporation filed exceptions to such claim on the ground that Wood had not rendered any services as president of the corporation during the time for which he had charged for the salary thus allowed. Wood filed an answer to such exceptions, raising an issue of fact, which, upon trial before a jury, resulted in a verdict in favor of Wood for the sum of eight hundred dollars. There was no agreement be-

tween the corporation and Wood that he should receive any salary, and no action was taken by the corporation in regard thereto prior to the meeting above referred to. The by-laws of the corporation provided as follows: "The salaries of the president, vice-president, and controller shall be fixed by the directors; those of all subordinate officers shall be fixed by the manager, subject to the approval of the board." Judgment was entered on the verdict above referred to, and Wood appealed.

E. B. Dufur, for the appellant.

J. H. Woodward, for the respondent.

²³ THAYER, C. J. The appellant's counsel urged at the hearing two points with much force and reason: 1. That the board of directors of the insolvent corporation having fixed and allowed the appellant's compensation for services as president of the board for the time charged—one hundred and fifty dollars a month for the previous thirty-two months—the allowance so made was conclusive upon the exceptors; 2. That the uncontroverted testimony given on the part of the appellant at the trial proved, as a matter of law, that he was entitled to such allowance, and that it was error on the part of the jury to find thereon that he was only entitled to eight hundred dollars.

I was inclined to believe when the question was presented at the argument that the allowance of the appellant's claim by the board of directors, as shown by the proof, was at least *prima facie* evidence that he was entitled to the sum allowed. Section 3225, Hill's Code, provides: "From the first meeting of the directors the powers vested in the corporation are exercised by them, or by their officers or agents, under their direction, except as otherwise specially provided in this chapter." My first impression was that an allowance so made would be regarded as correct and valid unless impeached for fraud or collusion. I find, however, upon an examination of authorities bearing upon the subject that such an allowance on account of past services cannot legally be made; and some of them go so far as to hold that a board of directors of a corporation cannot contract with one of its own members for compensation unless authorized to do so by the charter of the corporation. In *Loan Association v. Stonemets*, 29 Pa. St. 534, the court, by Porter, J., in the concluding part of the opinion, says: "If services of the director become im-

portant to the corporation, let him resign and enter its employment like any other man. If it be proper that directors generally should receive compensation, let it be so provided in the organic act which creates the body. Those who commit their money to its care will then do it with their eyes open. Until ²⁴ this be provided there is no reason in law or morals for allowing their property to be taken without their knowledge or consent." The decision in this case is very pronounced that a resolution passed by a corporation after such services are rendered is without consideration, and imposes no obligation on the corporation which can be enforced by action. So also is the decision in *Kilpatrick v. Penrose Ferry Bridge Co.*, 49 Pa. St. 118; 88 Am. Dec. 497. Both these decisions hold that corporations are not liable for services performed by their officers unless rendered in accordance with an express contract for compensation entered into prior to such performance. The same principle was also adhered to in *Cheaney v. Lafayette etc. Ry. Co.*, 68 Ill. 57; 18 Am. Rep. 584. In the latter case a director in a railway corporation was appointed a member of the executive committee thereof, and acted as such for a length of time; he was also appointed an agent of the company to transact other of its affairs. He charged for his services in both cases, and presented a claim therefor to the company amounting to four thousand dollars, which was audited by its executive committee, and the board of directors of the corporation, at a meeting subsequently held by them, appropriated twenty-five thousand dollars to pay this claim and certain other ones. The court in an action to enforce the payment of the said claim held that the claimant was not entitled to recover for the services rendered by him for the company as director; that in order to entitle him to recover compensation for such services it must have been provided for and fixed in the by-laws, or by resolution of the directors spread upon the minutes of their proceedings before the services were rendered. The court, however, held that the claimant was entitled to recover for services rendered for the company which did not pertain to his duty as such director. This doctrine was recognized as the law, and maintained in *Graves v. Mono Lake Hydraulic Mining Co.*, 81 Cal. 303.

From these, and a great many other authorities which might be cited, it ²⁵ is evidently a settled rule of law that a director

in a corporation acquires no legal claim against it for services performed by him in the discharge of duties pertaining to the office or trust unless a compensation therefor was fixed by a resolution or by-law of the corporation prior to the performance of the services, and that the auditing and approval of such a claim by the auditing officers of the corporation does not impart to it legal validity. If, however, services are performed by such director for the corporation, at its instance and request, in regard to matters outside of the duties devolving upon him by virtue of his office or trust, then he is entitled to claim compensation therefor upon a *quantum meruit*, although none had been fixed by the corporation prior to the performance thereof.

The appellant in this case therefore had no standing in court without proving that the compensation for the services claimed by him had been fixed by the corporation in the manner indicated before they were rendered, or that said services were not germane to the duties of his position of trust, and that he was directed by the corporation to perform them. Otherwise no legal objection can be established against the corporation, although the services were rendered in the expectation of a remuneration therefor: *New York etc. R. R. Co. v. Ketchum*, 27 Conn. 170. According to this view, which seems to be sustained by an overwhelming weight of authorities, the appellant had no legal right to demand the four thousand eight hundred dollars for salary as president of the board of directors, notwithstanding his claim therefor had been approved by the board. It is unnecessary, therefore, to consider the second question presented by the appellant's counsel, which is above set out, nor the instruction of the court as to the right of the jury to inquire into the merits of the appellant's claim.

The instruction, under the strict rules of law, was more favorable to the appellant than the court was authorized to give. The appellant may have been justly entitled, in ²⁶ morals, to the salary claimed; but unfortunately for him, the law does not recognize his claim therefor as a legal obligation. The services for which the appellant claimed compensation were a part of the duties of his office, and compensation therefor, not having been fixed as suggested, cannot be enforced. The judgment appealed from must, for the reasons mentioned, be affirmed.

CORPORATIONS—SALARY OF DIRECTORS.—A director of a corporation is not entitled to compensation for his services as a director in the absence of any agreement in advance that he shall receive such compensation: *Wicks v. Crittenden*, 93 Cal. 17; *Brown v. Republican Mountain Silver Mines*, 17 Col. 421; *Bakins v. American etc. Bronze Co.*, 75 Mich. 568; *Mather v. Eureka Mower Co.*, 118 N. Y. 629; *Martindale v. Wilson-Cass Co.*, 134 Pa. St. 348; 19 Am. St. Rep. 706, and note; *Holder v. Lafayette etc. Ry. Co.*, 71 Ill. 106; 22 Am. Rep. 89. But a director can recover for the performance of duties not imposed upon him as director by the charter or by-laws of the company where he acted not as a director but as agent: *Cheaney v. Lafayette etc. R. R. Co.*, 68 Ill. 570; 18 Am. Rep. 584; *Santa Clara Mining Assn. v. Meredith*, 49 Md. 389; 33 Am. Rep. 264. A further discussion of this question will be found in the note to *Ten Eyck v. Pontiac etc. R. R. Co.*, 16 Am. St. Rep. 639, where the cases in this series are collected.

STATE v. RANDOLPH.

[38 OREGON, 74.]

CONSTITUTIONAL LAW—POLICE POWER OF STATE—REGULATION OF OCCUPATIONS.—The right of every person to pursue any lawful business, occupation, or profession, is subject to the paramount right, inherent in every government, as a part of its police power, to impose such restrictions and regulations as the protection of the public may require.

CONSTITUTIONAL LAW—REGULATION OF PRACTICE OF MEDICINE.—A statute which makes it unlawful for any person to practice medicine or surgery in the state without first obtaining from the state board of examiners a certificate that he is a graduate of a medical institute in good standing, or if he is not a graduate, that he has been found on examination to be qualified to practice medicine and surgery, or that he was a practitioner of medicine and surgery, and was so engaged at the time of the passage of the act, is not unconstitutional as a discrimination between citizens by permitting one to practice medicine or surgery without examination who was so engaged when the act took effect, while it denies the privilege to another who may wish to engage in such practice after the passage of the act; nor is it unconstitutional as granting privileges or immunities to any citizen or class of citizens within or without the state.

CONSTITUTIONAL LAW—RIGHT TO REGULATE PRACTICE OF MEDICINE.—The power of the legislature to prescribe such reasonable conditions as are calculated to exclude those who are unfitted to discharge their professional duties, is large and comprehensive, and cannot be doubted.

CONSTITUTIONAL LAW—REGULATION OF PRACTICE OF MEDICINE.—A statute exempting a practitioner of medicine or surgery at the time of its passage from obtaining a diploma or certificate that he is entitled to practice, and requiring all others to obtain such diploma or certificate, is not unconstitutional as granting privileges or immunities to any citizen or class of citizens, nor does it deny to any one the privilege of practicing such profession, when they shall furnish appropriate evidence of their qualifications to do so.

Nathan D. Simon, and Sears and McGinn, for the appellants

Wilson T. Hume, District Attorney, John H. Hall, and George E. Chamberlain, Attorney General, for the state.

7^o LORD, C. J. The defendants were severally indicted for practicing medicine without having first obtained a license for that purpose, in violation of the act of the legislature regulating the practice of medicine and surgery in this state. Each defendant interposed a demurrer that the indictment did not state facts sufficient to constitute a crime, which the court below overruled, whereupon the defendants each entered a plea of not guilty, and subsequently, upon being tried by a jury, were found guilty, and sentenced by the court to pay a fine of fifty dollars each, from which several judgments the defendants have prosecuted this appeal. The defendants challenge the validity of the act of 1889 (Sess. Laws, 1889, 144), and the amendments thereto (Sess. Laws, 1891, 153), regulating the practice of medicine and surgery in this state, as in violation of section 20, article 1, of the ^{so} state constitution; and also in conflict with section 2 of article 4 of the constitution of the United States, and the fourteenth amendment to the same. Under the statute in question and its amendments, every practitioner of medicine and surgery, to entitle him to practice his profession is required to obtain a certificate from the state board of examiners that he is a graduate of a medical institution in good standing; or if he is not a graduate, that he has been found, upon examination by the board, to be qualified to practice medicine or surgery; or that he was a practitioner of medicine or surgery, and was so engaged at the passage of the act; and that statute also provides that any person practicing medicine or surgery without obtaining such certificate shall be deemed guilty of a misdemeanor, and shall be punished by a fine or imprisonment or both, in the discretion of the court. Corresponding to these classes, the act provides that the board shall prepare three forms of certificates—one for persons in possession of diplomas or licenses, one for candidates examined by the board, and one for those who were engaged in the practice at the passage of the act, and have registered, etc., in conformity with section 18 of the act.

The objections are directed to that section of the act as un-

constitutional which permits any person to obtain a certificate of qualification to practice medicine or surgery, who was so engaged in the practice of his profession when the act took effect, upon making the registry required by its provisions. These objections are: 1. That the act discriminates between the citizens of this state by permitting one to practice medicine or surgery without examination, who was so engaged when the act took effect, while it denies the privilege to another who may wish to engage in the practice after the passage of the act; and 2. That it discriminates between residents and nonresidents of the state, by permitting a physician who was a resident and engaged in the practice when the act took effect, to continue the pursuit of his profession without ⁸¹ examination, while it denies the privilege to a nonresident who may seek to engage in the practice, unless he undergoes an examination by the board, or is a graduate, and in possession of a diploma.

The first point is based on the assumption that this act, or section 13 of the act, is in conflict with section 20, article 1, of the state constitution, which provides that "no law shall be passed granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens," and the second point is based on a like assumption that section 13 of the act is in conflict with section 2 of article 4 of the constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and also in conflict with that portion of the fourteenth amendment thereto, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States."

Both these contentions involve the same principle, and the discussion of one necessarily includes the other, so that their separate consideration is not necessarily to be pursued. Both proceed upon the hypothesis that the act grants privileges or immunities to one class of persons while it denies the same privileges or immunities to another class. It is not thought that either of these contentions is tenable, or that the section referred to is in conflict with the constitution of the state or of the United States. The right of every person to pursue any lawful business, occupation, or profession he may choose to pursue, subject to such restrictions as the government may

impose for the protection of the health, welfare, and safety of society, is unquestioned. This paramount right, inherent in every government, to provide such regulations in regard to various avocations as the public welfare may require is very broad and comprehensive. It has been said that "all laws for the protection of the lives, limbs, health, and quiet of persons, and the ^{ss} security of all property within the state, fall within this general power of the government": *State v. Noyes*, 47 Me. 189. Redfield, C. J., said that under the "general police power of the state, persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned": *Thorpe v. Rutland R. R. Co.*, 27 Vt. 150; 62 Am. Dec. 625. "Whatever difficulty, therefore, there may be in defining the precise limits and boundaries by which the exercise of this power may be governed, all agree that laws and regulations necessary for the protection of the health, morals, and safety of society are strictly within the legitimate exercise of the police power": *Singer v. State*, 72 Md. 465.

Among the various occupations of life there are many which may be pursued by a person without danger to the public health or detriment to the public welfare, and need, therefore, no regulations to control them; but there are other occupations or callings which require special knowledge or training or experience to qualify a person to pursue them with safety to the public health and interests; and when the occupation or calling is of this character no one can question the power of the state to impose such restrictions and to provide such regulations as it may deem proper for the protection of the health and welfare of its citizens from the evils resulting from ignorance and incapacity. "The power of the state," said Mr. Justice Field, "to provide for the general welfare of its people, authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure, them against the consequences of ignorance and incapacity as well as of deception and fraud": *Dent v. West Virginia*, 129 U. S. 122.

There are few professions that require more careful ^{ss} preparation to qualify a person to practice than medicine, and

certainly there are few that more nearly concern the comfort, health, and life of every citizen.

In view of the important interests committed to the charge of the physician, the necessity that he should possess the necessary qualifications of learning and skill is so great and his want of them likely to be attended with results so injurious to health and destructive to life, that the power of the state to enact such laws regulating the practice of medicine and surgery as are calculated to protect the people from ignorant pretenders and charlatans, has been established by repeated adjudications and is now too firmly settled to admit of doubt. In *State v. State Ex. Med. Board*, 32 Minn. 324, 50 Am. Rep. 575, the court says: "In the profession of medicine, as in that of law, so great is the necessity for special qualifications in the practitioner, and so injurious the consequences likely to result from the want of it, that the power of the legislature to prescribe such reasonable conditions as are calculated to exclude from the profession those who are unfitted to discharge its duties cannot be doubted." For the accomplishment of this purpose, that is to provide means for the protection of the public health from the ignorance and incapacity of those who are unfitted to discharge the duties of a physician, our state, as other states have done, enacted the law in question; and unless it grants to some citizen or physician, or class of them, some right or immunity which, upon like terms or under similar circumstance, it denies to another, it is a valid exercise of the police power, and must be upheld.

Section 13 of the act, in effect, only permits physicians that were engaged in the practice when the law took effect, upon registering as required by its proviso, to apply to the board and obtain a certificate of qualification authorizing them to practice medicine or surgery without an examination. In a word, it permits persons who were engaged in the practice when the law took ⁸⁴ effect to continue in the practice without an examination. As it is the right of the state to prescribe qualifications based on knowledge or professional skill, necessarily the state must be the judge of such qualifications; and, if the rule established to determine them is reasonable and appropriate for that purpose, it cannot operate to deprive any one of the privilege or right to practice his profession. The test of qualification, under the act, is based on medical

skill and knowledge. If the person seeking to practice medicine has a diploma or license from some reputable institution it is sufficient evidence, under the act, of the requisite qualifications to entitle him to practice. It is only when the person wishing to practice has no such evidence of his qualification that the act requires that he shall submit himself for examination by the board. In establishing this rule, the state saw fit, for reasons satisfactory to itself, to except by section 13 those physicians who were engaged in the practice at the passage of this act. In doing this it made the fact of being so engaged in the practice at that time sufficient evidence of qualification—equivalent to a diploma—rendering an examination unnecessary. To apply the language of Hawley, C. J., it in effect declared that the physician or surgeon who was engaged in the practice immediately preceding the passage of the act was as well qualified, in the judgment of the state, to continue the practice of his profession as the student coming fresh from the halls of college with his diploma was to commence it. But in establishing this rule as to these physicians and surgeons, the state did not deny the privilege or the right of practicing medicine and surgery to any one. No class of citizens of this state are prohibited from the practice of medicine or surgery by the act, provided they have the proper qualifications and comply with the law in relation thereto.

The error of the defendant's contention consists in assuming that the act grants "privileges or immunities" to one class of citizens or physicians of this state which ⁵⁵ it denies to other citizens of this state or other states. The act does not grant privileges or immunities to any citizen or class of citizens either within or without the state; it only establishes a rule of evidence by which qualification to practice medicine and surgery is to be determined. It makes the fact of a person being engaged in the practice when the law took effect sufficient evidence of his fitness to continue the practice of his profession without an examination, in the same way that the diploma of the student is accepted as sufficient evidence of his fitness to commence the practice without an examination.

Under a similar act, the precise question now under consideration was presented in *Fox v. Territory*, 2 Wash. (Ter.) 297. There, as here, the objection urged was that the act discriminated between persons of equal learning and skill, by

permitting that person to practice medicine and surgery who was so engaged the day before the passage of the law, while it denied the privilege to the person who may seek to engage in the practice the day after, or at any time after, the passage of the law; and the court, by Turner, J., said: "It appears to be an answer to this objection to say that the law does not deny the privilege of practicing medicine to any one. Any citizen of the territory may qualify himself in the manner pointed out by the law, and thereafter may lawfully engage in the practice of medicine and surgery." In *Ex parte Spinney*, 10 Nev. 323, similar objections were urged under a statute which excepted physicians and surgeons who had practiced their profession in the state for the period of ten years preceding the passage of the act. Hawley, C. J., said: "The real test of qualification under the act is based upon medical skill and knowledge. The physician or surgeon substituted to practice must have received a medical education, and must have obtained a diploma from some regularly chartered medical school."

Now the legislature saw fit in establishing this test to accept from its provision a certain class of physicians⁸⁶ and surgeons; in so doing it in effect declares (to state the extreme case) that the physician or surgeon who had practiced his profession in his state for a period of ten years immediately preceding the passage of this act was as well qualified, in its judgment, to continue the practice of his profession as the student coming fresh from the halls of college with his diploma was to commence it. In adopting this exception, the legislature did not infringe upon any provision of our state or federal constitution. In *Dent v. West Virginia*, 129 U. S. 124, upon appeal from the supreme court of that state (25 W. Va. 1), the statute, like that of Nevada, excepted those physicians who had practiced medicine in the state continuously for a period of ten years; and to objections urged against its constitutionality, Mr. Justice Field said: "There is nothing of an arbitrary character in the provisions of the statute in question; it applies to all physicians except those who may be called for a special case from another state; it imposes no conditions which cannot be readily met; and it is made enforceable in the mode usual in kindred matters, that is, by regular proceedings adapted to the case. It authorizes an examination of the applicant by the board as to his qualifi-

cations, when he has no evidence of them in a diploma of a reputable medical college in the school of medicine to which he belongs, or has not practiced in the state a designated period prior to March, 1881." See, also, *State v. State Med. Ex. Board*, 32 Minn. 325; 50 Am. Rep. 575; *State v. Green*, 112 Ind. 462; *State v. Dent*, 25 W. Va. 1, where statutes containing similar provisions were sustained, and held to be constitutional.

But the case mainly relied upon in support of the contention by the defendants, is *State v. Pennoyer*, 65 N. H. 113. There the act discriminated in favor of one class of physicians to the detriment of another. It divided practitioners of medicine into two classes: 1. Those who have, and 2, those ^{or} who have not, resided continuously in some one town of the state during a specified period. The latter class were required, while the former were not, to pay five dollars for a license in order to continue the practice of their profession.

This was an arbitrary discrimination, laying a charge or burden on one class of physicians and citizens of the state not imposed upon another, based, not upon fitness or medical skill, but upon unchanged residence for the specified period. As the court says: "If all physicians alike, as well those who have not resided and practiced during the specified period in a single town, were required to procure and pay for a license, it may be that the statute would be open to no constitutional objection." It was therefore owing to the consideration that a change of residence during a specified period deprived one physician, without regard to his qualification or competency, of the right to practice his profession unless he paid a certain sum and obtained a license; while another, whose residence had remained unchanged, perhaps inferior in his education and medical skill, was exempted from the burden of paying such sum for a license, that the court held that the statute arbitrarily discriminated in favor of one citizen to the detriment of another, and for that reason was unconstitutional and void. No such objection can be raised against the act in question; it imposes no burden or tax upon one class while exempting another class from its payment. The difference is, that the objection goes in one case to the rule of evidence by which the act requires qualification for practice to be determined, while in the other some physicians who are declared by the statute, or under its provisions are found to be quali-

fied to practice, are and others are not subjected to the burden of paying for a license. The difference is material and fatal.

The objection in the case at bar is that the act permits those who were engaged in the practice when the act took effect to continue to practice without examination, and challenges the validity of this rule or standard of qualification. ²² As we have shown, such and similar provisions regulating the practice of medicine do not operate to deprive anyone of the privilege of practicing his profession, and have uniformly been held by the courts to be constitutional. As Mr. Justice Field said: "The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation": *Dent v. West Virginia*, 129 U. S. 124. In our judgment the act in question is fair and reasonable, and imposes no conditions which cannot be readily met by reasonable study and application; its requirements are an appropriate exercise of the police powers of the state to protect the life and health of its citizens from the ignorance and incapacity of the charlatan and quack; and the act, in assuming that those engaged in the practice were qualified, and permitting them to continue the pursuit of their profession without examination, violated no right of the defendants in a constitutional sense, nor did it deny them the privilege of practicing their profession when they should exhibit or furnish appropriate evidence of their qualifications so to do.

We think the act is valid in the particular objected to, and must be upheld. It results, therefore, that there was no error, and the judgment must be affirmed.

STATUTES—POLICE POWER—REGULATION OF BUSINESS.—This question will be found discussed in *Ex parte Whitwell*, 98 Cal. 73; 35 Am. St. Rep. 152, and note, and the extended note to *Butler v. Chambers*, 1 Am. St. Rep. 644, where the cases in this series are collected.

STATUTES—CONSTITUTIONALITY OF, REGULATING THE PRACTICE OF MEDICINE.—The legislature may regulate the practice of medicine and surgery

and prescribe the qualifications of applicants for license: *Eastman v. State*, 109 Ind. 278; 58 Am. Rep. 400; *Ex parte McNulty*, 77 Cal. 164; 11 Am. St. Rep. 257; *Orwig v. Board of Medical Examiners*, 12 Mont. 203; *Haworth v. Montgomery*, 91 Tenn. 16. See the note to *State v. Hinman*, 23 Am. St. Rep. 28. So also is an act regulating the practice of dentistry constitutional: *State v. Vanderhulst*, 42 Minn. 129; *Gosnell v. State*, 52 Ark. 228.

NICHOLS v. SOUTHERN PACIFIC COMPANY.

[28 OREGON, 123.]

CARRIERS—COUPON TICKETS OVER THEIR OWN AND CONNECTING LINES are entire contracts as to each line, but severable as between the different lines.

CARRIERS—COUPON TICKETS—CONTINUOUS PASSAGE.—The purchaser or holder of a coupon railroad ticket over connecting lines is not bound to make a continuous trip from the starting point of destination unless there is a stipulation upon the ticket to that effect. He is entitled to stop-over privileges at the end of each line, but when he has started over any of the connecting lines he is bound to continue to the point on that line named in his coupon.

CARRIERS—COUPON TICKETS—TRANSFERABILITY—EJECTION OF HOLDER—DAMAGES.—A coupon railroad ticket over several connecting lines of railroad, issued without limitations or restrictions as to ownership is transferable after being partly used, though issued and sold at a reduced rate, and entitles the holder to ride thereon and to recover damages for expulsion from the train when he presents such ticket in payment of his fare.

CARRIERS—EVIDENCE.—DECLARATIONS OF A RAILROAD TICKET INSPECTOR, on examining a ticket, that he rejected it solely on the ground that it was presented by a person other than the original purchaser, are admissible against the railroad company to show that the ticket was genuine and authorized when originally issued and sold.

W. D. Fenton, for the appellant.

Alfred F. Sears, Jr., for the respondent.

123 LORD, C. J. This was an action to recover damages from the defendant for ejecting the plaintiff from its cars, and judgment was for the plaintiff, from which the defendant has brought this appeal. As appears from the evidence, the ground upon which the defendant ejected plaintiff from its cars was that he was not the original purchaser of the ticket upon which he claimed the right to ride on its cars from Portland to San Francisco. With the exceptions hereafter noted, the ticket was as follows:

Stromberg Pat., May 8, 1878, Rand, McNally & Co., Agents.

ISSUED BY		99	98
BALTIMORE & OHIO R. R.		97	96
ONE PASSAGE OF CLASS INDICATED TO POINT ON		95	94
SOUTHERN PACIFIC COMPANY		93	92
(PACIFIC SYSTEM)		91 L	90
BETWEEN PUNCH MARKS.		1800 and	
WHEN OFFICIALLY DATED, STAMPED AND PRESENTED WITH COUPONS ATTACHED.		30	31
<i>Subject to the following Contract:</i>		28	29
1st. In selling this Ticket and checking baggage hereon, this Company acts as Agent, and is not responsible beyond its own line.		26	27
2nd. It is subject to the STOP-OVER regulations of the lines over which it reads, and may be exchanged by Con- ductors at any point for tickets or checks conforming to such regulations.		24	25
3rd. THIS TICKET IS NOT VALID after date indicated by L punch cancellations on margin, and if more than one date is cancelled it shall be void.		22	23
4th. If this Contract and its Coupons bear no cancellation or stamp other than the ordinary dating stamp, the holder is entitled to an unlimited first-class passage, otherwise the un- punched figure above or below the word CLASS on this Ticket and its Coupons indicate its class.		20	21
5th. Any alteration whatever of this Ticket renders it void; and if more than one station is designated as the ter- minal point, it will be honored only to that station indicated by punch marks nearest the starting point of final coupon.		18	19
6th. BAGGAGE LIABILITY is limited to wearing apparel, not exceeding \$100.00 in value.		16	17
7th. None of the lines named in this Ticket will be held liable for damages on account of any statement not in ac- cordance with this Contract made by any employe of said lines.		14	15
8th. It is especially agreed and understood by the holder that no Agent or employe of any of the lines named in this Ticket has any power to alter, modify or waive in any man- ner any of the conditions named in this Contract.		12	13
CHAS. O. SCULLE, <i>General Passenger Agent.</i>		10	11
In consideration of the reduced rate at which this Ticket was sold, I agree to the above con- tract.		8	9 L
L. S. NICHOLS, <i>Purchaser.</i>		6	7
WITNESS:		4	5
J. P. BLISS, Agent.		2	3
		DAY	I
		DEC.	NOV.
		OCT.	SEP.
		AUG.	JUL.
		JUN.	MAY L
		APR.	MAR.
		FEB.	JAN.
41	Form X 02599		
ISSUED BY		First-class if 1st	
BALTIMORE & OHIO R. R.		not punched, L	
SOUTHERN PACIFIC CO. (Pac. Sys.)		otherwise	
To points between Punch Marks.		class un-	
		punched. 2d	
Oregon City.	Roseburg.	Oatboro	
Salem.	Ashland.	San Francisco.	
Albany.	Redding.	Omao	
Eugene.	Marysville.	Kojave.	
Oakland.	Stockton.	Los Angeles.	
41	On conditions named in Contract. X 02599 One passage, not good if detached.	If limited punch here, L	
Via GN, CP, CPNCo, NP, SPCo.			

¹²⁵ On the back of the ticket had been stamped these words: "Baltimore and Ohio Railroad Company, April 8, 1891, Columbus, Ohio, City Ticket Office." The evidence shows that the plaintiff bought this ticket on the twentieth day of April, 1891, in Seattle, for twelve dollars, and there signed it; that he was not in Columbus, Ohio, on the eighth day of April, 1891, when the ticket purports to have been issued; that the ticket is just as it was when plaintiff bought it, with the exception of its signature and the coupon slip entitling him to ride from Seattle to Portland, which the conductor detached during his passage between these places on the twentieth day of April, 1891; that the plaintiff was aboard of defendant's cars at Portland on the night of the 21st of April, 1891, in continuation of his journey to San Francisco, and that soon after the train started, and when only a short distance from Portland, Mr. Blue, the ticket inspector, demanded to see the plaintiff's ticket, which he produced and handed to him, it being the same ticket as the above; that Mr. Blue, after examining it, and requiring the plaintiff to write his name on the back of it, informed the plaintiff that he was not the original purchaser of the ticket, and that he must pay his fare or get off the train, and at the same time put the ticket in his pocket, and refused to return it to the plaintiff when he subsequently demanded it before leaving the train; that the plaintiff finding when the train reached Oregon City that force would be used to expel him unless he paid his fare, and not having sufficient money for that purpose, got off the train and came back to Portland the next day.

Substantially, upon this state of facts, the trial court charged the jury in effect that "if the plaintiff was in possession of the ticket within the time limited upon its face when it should be used, and went on board of the cars of the defendant and presented this ticket as an evidence of his right to ride, and he was put off the car upon the ground that he was not the original purchaser of the ticket, then the expulsion of the plaintiff from the car ¹²⁶ was wrongful, and the plaintiff would have a right to recover"; that "the holder of the ticket was not precluded from transferring it to another at the end of any particular section of this journey, which the ticket indicated that the holder might perform, and that there was no prohibition in law or in fact against the transfer of such a ticket as this at the end of

any particular part of the journey indicated by the coupons which made up the ticket originally, and it was no valid objection to this man's riding upon the train that he was a different person from the person to whom the ticket was originally delivered when first purchased"; that "if there had been a stipulation on the face of this contract that the ticket was not transferable, the rule would have been different, that would be a valid and sufficient contract, and the party taking the ticket would be bound by it, and if not the original purchaser would have no reason to complain if put off the train."

While there are some other assignments of error arising out of exceptions taken to the evidence and to other instructions of the court, some of which include the same objection, and to which we shall presently advert, the main ground of contention is based upon the alleged error contained in the instructions referred to above. This contention is, that the ticket or contract is entire and personal and not assignable. Upon its face the contract indicates that the ticket was issued by the Baltimore and Ohio Railroad Company, as principal as to its own lines of railroad, but as agent as to the lines of other railroads to be passed over, including the defendant company's road. The contract was entire as to a passage over the line of each road, which, when begun, must be completed, but was severable as between the different roads. It was a distinct contract as to each road. Each company, through the agent selling the ticket, made a contract for passage over its road. Between tickets of this sort, usually denominated coupon tickets, which entitle the holder not only to passage over the line of the company issuing ¹²⁷ them, but also over connecting lines necessary to reach his destination, and the ordinary ticket which entitles the holder to passage only over the line issuing it, there is usually this distinction, that in the absence of a contract for a continuous passage only, or through transportation, the holder of a coupon ticket is not bound to continue his passage without intermission when once begun, but may stop off at the end of each line for a reasonable time without losing his right to resume it; while the holder of an ordinary ticket cannot temporarily discontinue his passage when once begun without losing his right to resume it, unless otherwise agreed: *Hutchinson on Carriers*, secs. 577, 578.

In cases of this last sort, both parties are held to a continuous performance, when the transportation is once begun,

until it is completed. As Walker, J., said: "When the company has entered upon the performance of its contract, the passenger has a right to insist that it shall continue until completed. On the other hand, the right is reciprocal. When the passenger presents his ticket, and the road has entered upon the fulfillment of its contract, it has an equal right to insist that it shall be continuous till completed; that it shall not be required to perform the contract in fragments": *Churchill v. Chicago etc. R. R. Co.*, 67 Ill. 393.

But in cases of coupon tickets, where the first carrier acts as agent for the succeeding carriers, the contract does not contemplate a continuous passage over connecting lines when once begun, unless such tickets so stipulate on their face, or there are circumstances from which such stipulation will be implied; otherwise the holders of them will be entitled to stop-off privileges at the end of each line represented by such tickets. This goes to show that such contracts or tickets as the above set out are not entire but several as between the different roads; it is only entire as to a passage over the line of each, which, when begun, must be completed. In *Little Rock etc. Ry. Co. v. Dean*, 43 Ark. 530, 51 Am. Rep. 584, it was held that a purchaser of such ticket over several connecting lines of railroads was not ¹²⁸ bound to make a continuous trip from the starting point to the place of destination, but that when he started on his journey over any of the connecting lines, he was bound to continue without stop to the point on that line named in his coupon: See, also, *Auerbach v. New York etc. R. R. Co.*, 89 N. Y. 281; 42 Am. Rep. 290; *Brooke v. Grand Trunk Ry. Co.*, 15 Mich. 332. Nor is there anything in *Walker v. Wabash etc. Ry. Co.*, 15 Mo. App. 333, in conflict with our position. There it was expressly stipulated on the face of the ticket that it was good only for a continuous passage; and necessarily when the journey was once begun it required that the passenger should pursue it continuously or without intermission. Hence the court held that the holder of such ticket is not, after beginning the journey, entitled to stop off at an intermediate point and subsequently resume the journey. In such case the transit is an entire thing and necessarily not assignable. As Thompson, J., well observed: "If the contract does not allow the passenger the privilege of stopping off at a particular place, it is still more difficult to understand any principle upon which he is entitled to stop off at such place, and then, instead of resum-

ing the journey himself on a subsequent train, to introduce some one else in his stead and compel the carrier to complete the contract by carrying such other person on a subsequent train." Hence the court held that a purchaser of a "train check," issued to another person upon a limited ticket, and expressed to be good only for a continuous passage, was not entitled to subsequently pursue the journey begun by the purchaser.

But it is argued that the ticket in question is not assignable, for the reason that its terms purport a sale at a reduced rate. But it is not perceived how that alters the nature of the obligation. The general rule is, that a railroad ticket issued without limitations or restrictions is transferable; that the property in them passes by delivery, and entitles the holder to ride upon it. Nor is there anything in the fact that a railroad ticket is issued and sold at a reduced rate to alter the nature of the obligation ¹²⁰ so as to affect its assignability, unless it is expressly conditioned that in consideration of such reduced rate it shall not be transferable. Nor do any of the authorities cited by counsel hold any different view. In all of them there are words of limitation or restriction upon the tickets which affected their assignability, and made their transfer unauthorized and not binding upon the company. It will only be necessary to refer to a few of them to illustrate this, and show their inapplicability to the case in hand.

In *Drummond v. Southern Pac. R. R. Co.*, 7 Utah, 118, the tickets were sold at Blue Rapids, Kansas, by an agent of the Union Pacific Company, and used to Salt Lake City, and there sold to the ticket broker, who sold them to the plaintiff and his wife for the remainder of the trip to San Diego, California. These tickets contained this condition: "8. . . . or if presented by any other person than the original holder, this ticket is void, and the conductor will take it up and collect full fare." The court says: "The purchaser, when he bought these tickets, knew that he had no right to ride part way upon them and sell them for the rest of the way; and the plaintiff knew by the terms of the tickets that he had no right to buy them." In *Cody v. Central Pac. R. R. Co.*, 4 Saw. 115, the ticket contract was for "one continuous emigrant passage from Omaha to San Francisco," and had, among other limitations, that "it was not transferable," and was signed by the purchaser. Necessarily the court held that the contract was

to carry the same person through the entire route, and that the assignee of it could not ride upon it. In *Granier v. Louisiana etc. R. R. Co.*, 42 La. Ann. 880, the following agreement was across the face of the ticket, viz: "This ticket is good only for persons named hereon, and when presented for or by any other, will be taken up and returned to the general ticket office."

These cases have no application to the case at bar. There are no words of limitation or restriction upon the ticket in question; it vested in the purchaser of it the ^{1st} evidence of his title to a passage over the line of the company issuing it, and also over the connecting lines represented by the coupons. The obligation of such carriers was only to carry according to its terms. These contained no words restricting the transportation to the original purchaser, nor inhibiting its assignee from riding upon it. The ticket had been issued and the consideration received for it, and in such case what principle is violated in requiring the carriers to perform the obligation to carry, whether the carriage or transportation be of A or B when the parties have put no restrictions upon its transfer? It is wholly a matter of contract, and to be determined upon like principles which govern other contracts. In *Hoffman v. Northern Pac. R. R. Co.*, 45 Minn. 53, it was held that after an "excursion" railroad ticket had been used by the holder in going one way over the route, it was valid in the hands of a purchaser from the original holder for the return trip, there being no condition in the contract to the contrary: See, also, *Carsten v. Northern Pac. R. R. Co.*, 44 Minn. 454; 20 Am. St. Rep. 589. As there is nothing in the terms of the ticket in question indicating that it shall not be transferable in consideration of a reduced rate or other thing, there does not seem to be any substantial reason why it should not be transferable and valid in the plaintiff's hands. As the judgment is conceded to be reasonable, if the plaintiff was improperly expelled from the cars, and the object of the appeal is mainly to secure a decision upon the question of the entirety and assignability of the contract, it is hardly deemed necessary by us, nor do counsel urge us, to consider other assignments of error to any great extent.

The evidence shows that Mr. Blue, the ticket inspector, regarded the ticket as genuine and duly issued, and that the only objection that he made to it, and the reason that he required the plaintiff to pay his fare or leave the cars at Ore-

gon City, was because the plaintiff was not the original purchaser of the ticket. Both by ¹³¹ exceptions to evidence and instructions, it is claimed to be error to have permitted the declarations of Mr. Blue to be given in evidence as to what he said at the time of the examination of the ticket, tending to show that it was genuine and authorized originally. These declarations referred to his reasons for rejecting the ticket, and were made in the line of his duty. He was charged with the duty and clothed with the authority of passing upon the validity of tickets issued like the one in question. When he demanded the ticket it was for the purpose of inspecting it and ascertaining whether the plaintiff had the right to ride upon it. He was required in the discharge of his duties to accept or reject it; and when he assigned as his only reason for rejecting it and refusing to allow the plaintiff to ride upon it that he was not the original purchaser, the defendant ought to be bound by that determination and the implication arising from it, that the ticket was authorized originally and genuine. There was some evidence tending to show that the defendant had recognized the issuance of such tickets as valid, to which exceptions were taken when allowed as evidence, and also to the instructions in respect to it. In view of other facts to which such evidence was allied, we do not think there can be any doubt of its admissibility, or even without them. Upon an examination of the whole case, we think there was no error, and that the judgment must be affirmed.

RAILROADS—TICKETS—WHETHER TRANSFERABLE.—A round-trip railway ticket, used by the buyer thereof in traveling to the place named therein, and then sold and transferred to another person, is, in the absence of any restrictions in the original contract of sale, valid in the hands of the holder: *Oaresten v. Northern Pac. R. R. Co.*, 44 Minn. 454; 20 Am. St. Rep. 589.

AGENCY.—DECLARATIONS OF AGENT, WHETHER BINDING ON PRINCIPAL: See the extended notes to the following cases: *Moore v. Bettie*, 53 Am. Dec. 773; *Durkes v. Central Pac. R. R. Co.*, 58 Am. Rep. 565; and *Roberts v. Burks*, 12 Am. Dec. 325. Statements of an agent to be binding on his principal must be made at the time of the transaction to which they relate, and such transaction must be within the scope of the agent's employment: *Empire Mill Co. v. Lovell*, 77 Iowa, 100; 14 Am. St. Rep. 272, and note; *Adams' Expr. Co. v. Harris*, 120 Ind. 73; 16 Am. St. Rep. 315, and note; *Sweetland v. Illinois etc. Tel. Co.*, 27 Iowa, 433; 1 Am. Rep. 285; *Pennsylvania R. R. Co. v. Books*, 87 Pa. St. 339; 98 Am. Dec. 229, and note; *Burnside v. Grand Trunk Ry. Co.*, 47 N. H. 554; 93 Am. Dec. 474, and note with the cases collected; *Simpson v. Waldbly*, 63 Mich. 439.

RAILROADS—COUPON TICKETS.—A ticket over connecting lines does not evidence a joint contract by them when it consists of coupons each entitling the passenger to transportation over the line of the carriers designated therein, and the whole is sold by one of them acting as the agent of the others, so far as their lines are concerned. Each coupon is a separate contract of the connecting carrier to whose line it applies: *Gulf etc. Ry. Co. v. Looney*, 85 Tex. 158; 34 Am. St. Rep. 787, and note.

EDDY v. COLDWELL.

[23 OREGON, 183.]

EXECUTIONS ISSUED ON DORMANT JUDGMENTS.—Under a statute providing that after five years an execution shall not issue upon any judgment except on motion followed by the issuance of summons as in actions at law, an execution issued without such proceedings is not absolutely void, but merely voidable, and is not subject to collateral attack.

John H. Mitchell, W. H. Thayer, and Edward B. Watson, for the appellants.

W. R. Willis, and Guy G. Willis, for the respondent.

184 LORD, C. J. This is an action at law to recover the possession of certain real property described in the complaint. The pleadings are in the usual form, and present the issue sought to be tried in such actions. The parties waived a trial by a jury and consented to try the issue before the court. After trial the court found and filed its conclusions of fact and law, which are set out in the record.

For the purposes of this case it is enough to state that on the twenty-sixth day of November, 1872, E. F. Russell became the owner of the tract of land in dispute through mesne conveyance duly executed and purporting to convey it; that on the fifth day of October, 1874, judgment was duly rendered and docketed in the county court for the county of Multnomah in favor of Lathrop Coldwell and against E. F. Russell; that on the twenty-eighth day of April, 1879, an execution was issued on said judgment, and returned unsatisfied on the twenty-fourth day of June, 1879; that no other execution was issued on said judgment until the thirty-first day of July, 1884, a period of over five years and three months after the issuing of said execution on the twenty-eighth day of April, 1879; that on the thirty-first day of July, 1884, without any leave of court, an *alias* execution was issued on said judgment, and on the twentieth day of September, 1884, the tract of land

in controversy was sold by the sheriff under said *alias* execution to James E. Coldwell for nine hundred and sixty-seven dollars and seventy-one cents bid by him and by him paid to the sheriff; that on the sixth day of October, the sale was duly confirmed by order of the county court, and in pursuance thereof, on the twelfth day of December, 1884, the sheriff executed a deed to James E. Coldwell; that on the third day of February, 1885, James E. Coldwell executed a deed of the same property, being the property in dispute to E. L. Coldwell, the defendant herein; that on the ¹⁶⁵ thirtieth day of January, 1890, E. F. Russell, and Carrie, his wife, executed a deed of the property in dispute to Jackson Jordan, and that on the fifth day of August, 1891, Jackson Jordan executed a deed of the same property to Teresa Eddy, the plaintiff herein. Upon this state of facts the court found, as conclusions of law, that the plaintiff was not entitled to the possession of the property described in the complaint; that the defendant is the owner in fee simple of said property and entitled to the possession of the same, etc., and thereupon rendered a judgment in favor of the defendant, from which judgment the plaintiff has brought this appeal.

From these facts it appears that an execution was issued upon the judgment before a period of five years had elapsed after its entry, but that a period of over five years and three months intervened between the dates of issuing the first and second executions without any proceeding to obtain leave to issue the latter, under which the sale of the property in dispute was made. As counsel for the plaintiff assert, the main question presented is whether this second execution, obtained without leave, is valid, and the sheriff's sale and deed under it effectual to pass the title to the land in controversy. Their contention is, that an execution issued without reviving the judgment, as provided by section 295, Hill's Code, where more than five years have elapsed since the issuance of the last execution, is void, and consequently insufficient to support the sale of land made thereunder. This contention is based on the assumption that the proceeding by motion to obtain leave to issue execution under section 295, Hill's Code, is, in substance and effect, essentially a different remedy than was afforded by the writ of *scire facias* at common law; that it is a separate proceeding, distinctly judicial, requiring notice to the judgment debtor, pleadings, trial, and judgment; and that the proceeding being such, the requirements of the sec-

tion to obtain leave to issue an execution, and to give notice to the judgment debtor, is mandatory and not merely ¹⁰⁰ directory, rendering an execution issued without such leave and notice a nullity, and the sale thereunder void. At common law no execution could be issued upon a judgment after the expiration of a year and a day unless an execution had been taken out and returned during that time. When this had not been done within that period, the judgment became inoperative or, as it is usually called, dormant, and so continued until it was revived by a writ of *scire facias*. This is a writ founded upon the judgment, the object of which is to obtain authority to have an execution issued thereon, and ordering the defendant to show cause, if any there be, why such execution should not issue. The writ presents the plaintiff's whole case, and constitutes the declaration to which the defendant must plead. It serves the double purpose of a writ and declaration, and as its object is to revive a dormant judgment, and not create one anew, it is not an original process, but a judicial writ. While *scire facias* is not an original process by which an action is commenced, it is considered to be so far original that the defendant may plead to it: *Winder v. Caldwell*, 14 How. 434. Lord Coke said that a *scire facias* is to be "accounted in law in the nature of an action," because the defendant could plead to it, and so the books have often said since; but the facts it recites assert no cause of action beyond or back of the judgment upon which it is based: Coke on Littleton, 2906; *Fenner v. Evans*, 1 Term Rep. 268; *Bilbo v. Allen*, 4 Heisk. 31. A *scire facias* cannot therefore be regarded as a new or an original action when the plaintiff is not required to file any new declaration or rule the defendant to plead, and when no new judgment is rendered on it, but it is merely a continuation of the old one. Referring to the fact that *scire facias* is sometimes spoken of as a new action, Mr. Freeman has well observed that "the object sought and the result accomplished by a *scire facias* to revive a judgment both show that it is not a new action, but merely a continuation of the old one; no cause of action beyond ¹⁰⁷ the old judgment can be asserted; no ground of defense anterior to the old judgment can be brought forward; no relief beyond that embraced in the old judgment can be obtained; and finally, the judgment entered upon the *scire facias* is simply "that the plaintiff have execution for the judgment in the said *scire facias* and costs," and whatever destroys the effect

of the original judgment also destroys the effect of its revival by *scire facias*": 2 Freeman on Judgments, sec. 442.

Hence the only defenses to a *scire facias* were either *nul tiel record*, or payment, or accord and satisfaction, or some other matter which showed that the judgment had been discharged. It may also be noted that by the form of the writ the intent is to give notice to the defendant to show cause, if any there be, why execution should not issue; yet in practice the cases show that the issuance of execution or revival of the judgment without such notice is not fatal to its validity. Where the judgment is revived by *scire facias* without any actual notice, the defendant may afterwards present his defense by *audita querela*, or upon motion to be relieved, if the revivor of the judgment was improper: Freeman on Executions, sec. 89. But this goes to show that a judgment revived by *scire facias* in such case, although without actual notice, is not void, but voidable. The consequences are the same as the issuance of an execution after a year and a day without a *scire facias*—the writ is voidable, but not void. The defendant may take proceedings to have it set aside, but if he neglected to do so others cannot do it for him, nor can he attack it collaterally, and a levy and sale under it are sufficient to transfer title: Freeman on Executions, sec. 29.

Turning now to section 295, we are to inquire whether its provisions were intended as a substitute for the writ of *scire facias* to revive a dormant judgment only aiming to accomplish the result sought by it; or to provide an essentially different remedy, which, in substance and effect, is a new action, and the result to be obtained by it a new judgment, and which is to be pursued exclusively, rendering any execution issued five years after ¹⁸⁸ its entry, without any proceeding to obtain leave upon notice duly given to the party to be affected by it, fatal to its validity, and all proceedings under it void, and ineffectual to pass title. Section 295 provides: "Whenever, after the entry of a judgment, a period of five years shall elapse without an execution being issued on such judgment, thereafter an execution shall not issue except as in this section provided." Then follow six subdivisions of said section, prescribing and regulating the mode of procedure to obtain leave of the court to issue execution. Subdivision 1 provides that the party in whose favor judgment is given shall file a motion with the clerk where the judgment is entered for leave to issue an execution, and that the motion shall state the

names of the parties to the judgment, the date of its entry, and the amount claimed to be due thereon, and that the motion shall be subscribed and verified as a complaint. Subdivision 2 provides that at any time after filing such motion the party may cause a summons to be served on the judgment debtor in like manner and with like effect as in an action at law; and that in case such judgment debtor be dead, the summons may be served upon his representatives by publication, as in case of a nonresident, or by actual service of the summons. Subdivision 3 provides that the summons shall be substantially the same as in an action at law; but instead of the notice therein required it shall state the amount claimed, or the property sought to be recovered, in the manner prescribed by subdivision 1 of the section. Subdivision 4 provides that "the judgment debtor, or, in case of his death, his representative, may file an answer to such motion within the time allowed to answer a complaint in an action at law, alleging any defense to such motion which may exist. If no answer be filed within the time prescribed, the motion shall be allowed, of course. The moving party may demur, or reply to the answer. The party opposed to the motion may demur to the same or to the reply. The pleadings ¹⁶⁹ shall be subscribed and verified, and the proceedings conducted as in actions at law." Subdivision 5 provides what the word "representative" shall be deemed to include. Subdivision 6 provides that "the order shall specify the amount for which execution is to issue, or the particular property, the possession of which is to be delivered; it shall be entered in the journal and docketed as a judgment, and the roll thereafter prepared and filed as a final record of the proceedings, as the case may be, in the same manner as a judgment."

It will be observed that the mode of procedure by motion to revive a dormant judgment is adopted, so far as applicable, as in actions of law. It prescribes the mode to be pursued to obtain leave of the court to issue execution and secure the fruit of the dormant judgment, and if the result sought to be accomplished by the motion is the same as was obtained by *scire facias*, the mode does not affect the substance, and the motion was intended as a substitute for it. A glance at the subdivisions already set out will be sufficient to show that the motion, like the writ of *scire facias*, is a proceeding designed to make the parties interested show cause, if any there be, why an execution shall not issue, or the dormant judgment

shall not be revived. There is no substantial difference between them, and the fact that this result can be as readily obtained by a motion and order as by a writ of *scire facias* fixes their identity, and indicates that the former was intended as a substitute for the latter. As Mr. Freeman says: "Practically, a writ of *scire facias* is nothing beyond a notice to the parties in interest that the applicant will, at a stated time, apply for a writ of execution, which notice is accompanied by a statement of the grounds upon which the application will be based." But he adds: "A notice prepared and signed by the plaintiff or his attorney, and served by a copy on the defendants in the suit, if living, or on their representatives, if dead, would accomplish every useful purpose accomplished by the writ; while the order of the court, made after hearing the ¹⁷⁰ motion specified in the notice, would afford relief as adequate as could be granted by a judgment on *scire facias*": Freeman on Executions, sec. 95. The whole purpose in either case is to recover the amount or the property established by the old judgment, and not to recover a judgment based on a new cause of action. Neither in one nor the other could any ground of defense or relief be obtained beyond that embraced in the old judgment; nor could any other defense be set up than *nul tiel record*, payment or matters going to show that the judgment was discharged. So that for all practical purposes the object of both was the same, and the motion and order only takes the place and serves the purpose sought to be accomplished by *scire facias*. In *Strong v. Barnhart*, 6 Or. 102, in referring to the proceeding under the statute by motion, Boise, J., said: "This is a proceeding in the nature of a *scire facias*, which is a judicial writ to obtain execution on a judgment, and the same defenses only can be pleaded in this proceeding that were pleaded to a *scire facias*"; thus recognizing that the proceeding by a motion was the same in nature, allowing no different defenses, and designed to perform the same office and obtain the same result. Nor is there anything in *Pursel v. Deal*, 16 Or. 299, to the contrary. It is true that Strahan, J., spoke of the proceeding by motion under the statute as a "cause of action," but by that was only meant that a party in whose favor a judgment had been given had the right to institute proceedings by motion to obtain an order to issue execution upon a dormant judgment.

It is insisted, however, that section 295 prohibits the issu-

ing of an execution in any other mode, or upon any other conditions than those prescribed; that negative words are employed which render the section mandatory. The section provides: "An execution shall not issue except as in this section provided: 1. The party in whose favor a judgment is given shall file a motion with the clerk of the court where the judgment is entered for leave to file an execution; 2. At any time after ¹⁷¹ filing such motion the party may cause a summons to be served on the judgment debtor in like manner and with like effect as in actions at law."

Prior to the enactment of the present statute our statute upon this subject was like the New York statute, from which it was taken, and provided that "an execution can be issued only by leave of the court upon motion, with personal notice to the adverse party." In all substantial particulars these provisions of the statutes are the same, and intended to afford the same relief. The present statute points out where the motion shall be filed, what it shall contain, and the summons to be served. The prior statute points out that it shall be upon motion, which necessarily would contain in substance what our present statute directs, and which was formerly recited in the writ of *scire facias*, and with personal notice to the adverse party, which is in effect nothing more than is accomplished by the service of the summons. All that can be said is, that the proceeding under the present statute is better and more definite, but the purpose is identical, and no new or different remedy is substituted. The intention is to provide the same protection to the judgment debtor as was provided at common law by *scire facias*, or as was provided by the former statute. In view of the considerations suggested, and the purpose to be served by proceedings to obtain authority to issue execution upon a dormant judgment, there is no substantial difference between the words of the present statute, "shall not issue except," and the former statute, "can be issued only." What is the difference between saying that an execution can be issued only by leave of the court on motion and an execution shall not issue except the party file a motion, etc.? The inference is just as strong in one case as in the other that the execution cannot issue "except," or only on the conditions prescribed. One is as mandatory as the other. The bare words in either case, considered apart from the nature of the proceeding and the purpose it is

designed to serve, might well be ¹⁷³ construed as mandatory, rendering proceedings in disregard of the statute a nullity.

Looking at the previous state of the law it is plain that under either the former or present statute the intention was to prescribe a mode of proceeding which was to be pursued in such case, but not to affect the jurisdiction in case there was an omission to follow the mode of procedure as prescribed. At common law, if an execution was not taken within a year and a day it could not be regularly issued thereafter without reviving the judgment by *scire facias*; yet it was invariably held that an execution taken out after that time, and without *scire facias* or judgment of revivor, was not void, but only irregular. The defendant might interpose and set it aside upon motion; but if he neglected to do so it was considered an implied admission that the judgment was still in full force. The application of this principle finds its illustration in *Mariner v. Coon*, 16 Wis. *468, where the question presented was, whether an execution issued upon a dormant judgment without leave of court is void or only voidable; but where it was insisted, as here, that the statute, in providing that "an execution can be issued only by leave of the court, upon motion," rendered void any execution not issued except in the mode prescribed, the court says: "But the code (sections 192 and 193 of the original act, now sections 1 and 2 of chapter 134, Revised Statutes) prescribes a different practice, and it is upon this that the counsel for the defendant chiefly relies. When the execution in controversy was issued the period was fixed at two years from the entry of judgment. It is now enlarged to five. After that period has elapsed it is provided that 'an execution can be issued only by leave of the court upon motion,' etc. This language is said to take away all power, except it be acquired in the manner prescribed, and to render every process issued in contravention of it void for want of jurisdiction. Were we to suppose the legislature to be speaking with reference to the question ¹⁷³ of power, then there is nothing in their language inconsistent with the position of counsel, and we might adopt his views. Upon looking to the previous state of the law and to other provisions of the act, we see very clearly that it was a matter of practice with which the legislature was dealing; a question as to the form of proceeding which should thenceforth be pursued, and not one which necessarily affected the jurisdiction in case the new practice was not complied with.

By section 33 of the original act the writ of *scire facias* is virtually abolished. The remedies hereafter obtainable in that form may be obtained by civil action under the provisions of the code. But by the particular provision of section 2, chapter 134, above referred to, the remedy by motion to revive a judgment which has become dormant by the lapse of time is substituted. Hence the peculiar significance of the word 'only,' upon which the counsel insists so strongly to show want of jurisdiction. The execution shall be issued only upon a motion, otherwise the plaintiff might resort to the remedy by civil action. It appears, therefore, that the consequences of a departure from the practice prescribed by statute are the same as they were at common law."

This view is supported in *Bank of Genesee v. Spencer*, 18 N. Y. 154, where the language of the statute was that "an execution can be issued only by leave of the court, upon motion with personal notice," etc., the court saying: "There was always a time after which the party who had recovered judgment was not at liberty to sue out execution without an application to the court. Formerly the time was a year and a day; and the form of obtaining an award of execution when one had not been issued in time, was by *scire facias quare executionem non*. Afterwards it was extended by the Revised Statutes to two years. By the code it was further extended, as we have seen, to five years, and the mode of obtaining leave was an application to the court on motion. Under the former practice, it was well settled that the execution, if issued too late, was not ¹⁷⁴ void: *Woodcock v. Bennett*, 1 Cow. 711; 13 Am. Dec. 568. It was liable to be set aside on motion; but such motion, like all others, must be made promptly; and if it appeared that the defendant had consented to the execution being issued, or if there were any circumstances which in fairness and equity precluded him from availing himself of the irregularity, the motion would not prevail: *Morris v. Jones*, 2 Barn. & C. 232. There is no reason why the same practice should not prevail under the code": See, also, *Winebrener v. Johnson*, 7 Abb. Pr., N. S., 205; *Union Bank v. Sargeant*, 53 Barb. 422. The same principles of construction were applied in *Lawrence v. Grambling*, 13 S. C. 120, upon the provision of the statute of South Carolina providing that "an execution can be issued only by leave of the court upon motion," etc., the court saying: "It is very clear that the provisions introduced by the code and the act of 1873 as

a substitute for the writ of *scire facias* as theretofore used should be construed as giving to the remedy provided as such substitute the same force and effect, when not otherwise provided, as the proceedings by *scire facias*. There is nothing in the provisions of the code, as it originally stood, or as it now stands under the amendment of 1873, that fixes the consequences that should result from the failure of a party to obtain leave of the court, where such leave is necessary. We must recur to the former practice to ascertain whether the failure to bring a *scire facias* where necessary rendered the execution issued without such proceeding absolutely void, or merely voidable on the ground of irregularity. This proposition was decided in *Ingram v. Belk*, 2 Strob. 208, 47 Am. Dec. 591, where it is said that in such cases the execution is merely voidable, and not void."

While it is true there are some courts which have declared executions issued without an order of the court void, Mr. Freeman expresses the opinion that "these decisions are in the main based on a misconception of the rules generally applied at common law to executions ¹⁷⁵ issued on dormant judgments in the absence of their revivor by *scire facias*": Freeman on Executions, secs. 27, 29. And while it is also true that by section 354 of the code the writ of *scire facias*, the writ of *quo warranto*, etc., are abolished, yet the section provides that the remedies heretofore obtainable under those forms may still be obtained by an action at law in the mode prescribed by the statute. It is only the form that is abrogated, the jurisdiction and power of the courts are not touched, nor the right to seek and reach through them all the remedy that the writ of *scire facias* once afforded: *Wilson v. Shively*, 10 Or. 273; *State v. Douglas County Road Co.*, 10 Or. 199; *People v. Hall*, 80 N. Y. 119. There is nothing in the statute indicating that the failure of a party to obtain leave of the court renders the execution void. No such consequences are directly or indirectly declared. On the contrary, the courts hold, with rare exceptions, in construing similar statutes, that no such consequences were intended or do result; that the intention of the legislature was not to take away all power from the execution unless it had been acquired by pursuing the mode prescribed; that it was not dealing with the question of power, but providing a new mode of procedure thenceforth to be pursued as a substitute for the former practice. These considerations, in view of the previous condition of the law,

indicate that the intention was to provide a form of proceeding to accomplish the same result as was obtained by *scire facias*, without affecting the jurisdiction in case an execution was issued without such proceeding. This view renders it unnecessary to consider any of the other propositions discussed by either counsel.

It results that the judgment must be affirmed.

EXECUTION ON JUDGMENTS BARRED by the statute of limitations cannot issue, nor can a valid levy or sale be made thereunder: *Ludeman v. Hirth*, 96 Mich. 17; 35 Am. St. Rep. 588, and note with the cases collected.

HOGG v. MACKAY.

[23 OREGON, 339.]

CONSTITUTIONAL LAW—COMMUTATION OF TAXES.—A statute which attempts by commutation to relieve a railroad company from the payment of any taxes on its property for a certain period, in consideration of its agreement to carry the troops and munitions of war of the state, free of charge, violates a constitutional provision requiring all taxation to be equal and uniform, and a just valuation of all property to be made for the purpose of taxation, and for this reason such statute is null and void.

CONSTITUTIONAL LAW—EXEMPTION FROM TAXATION.—Under a constitutional provision absolutely prohibiting the exemption of any property, except enumerated classes, from taxation, any statute attempting either directly or indirectly to exempt from taxation property not within the enumerated classes is void.

W. S. McFadden, W. S. Hufford, J. W. Rayburn, and D'Arcy and Bingham, for the appellant.

J. R. Bryson, Earl C. Bronaugh, and McArthur, Fenton and Bronaugh, for the respondent.

339 BEAN, J. This is a suit by T. Edgerton Hogg, receiver of the Willamette Valley and Coast Railroad Company, to enjoin the sheriff of Benton county from collecting or attempting to collect the state and county taxes assessed and levied upon the property of the said railroad company for the year 1889, and involves the constitutionality of section 11 of "An act to provide for the construction of the Willamette Valley and Coast Railroad," approved October 24, 1874 (Laws 1874, 51), as extended by the act approved February 5, 1885 (Laws 1885, 7), which reads as follows: "Section 11. That if said Willamette Valley and Coast Railroad Company shall, within

ninety days after the approval hereof by the governor, file in the office of the secretary of state its agreement, duly executed under its corporate seal, obliging itself to carry all troops and munitions of war of this state required to ^{be} conveyed on its road without charge to the state, for a period of twenty years from and after such approval, without other compensation than the moneys arising from taxes assessed, levied, or collected on the property of said company; then, in consideration of said agreement, and said services done or to be done for said period of twenty years, said company shall have and receive during all said term all the taxes levied, assessed, or collected, or which might have been levied, assessed, or collected, by the state, upon all its property, real and personal, and said taxes are hereby appropriated therefor."

The contention is that this section is in violation of the provisions of the constitution of this state that "all taxation shall be equal and uniform," and that the legislature "shall provide by law for uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes as may be specially exempted by law": Sec. 32, art. 1, and sec. 1, art. 9.

The power of taxation and the right to prescribe what property shall be taxed is a sovereign right belonging to the state in its sovereign capacity, and, in the absence of a constitutional restriction, necessarily implies the power to prescribe what property shall be exempt from taxation; hence it has been held that, when not prohibited by the state constitution, the legislature can bind the state by a contract with either an individual or corporation to surrender the right of taxation by the grant of either a perpetual or transient immunity from taxation, either in the form of a contract to pay a fixed sum in lieu of all taxes or by way of commutation, whatever the latter term may mean; and that as to the sufficiency of the consideration for such contract, the legislature is the sole and exclusive judge: *Cooley on Taxation*, 53; *Desty on Taxation*, 127; *Home of the Friendless v. Rouse*, 8 Wall. 430; *Humphrey v. Pegues*, 16 Wall. 244; *Hunsaker* ³⁴¹ *v. Wright*, 30 Ill. 146. But this doctrine has been questioned by the courts of many of the states, as well as by able dissenting opinions in the supreme court of the United States, upon the principle that the legislature has no right to bargain

away the taxing power of the state so as to place it beyond the control of succeeding legislatures: Desty on Taxation, 128; note to *Northwestern University v. People*, 18 Am. Law Reg., N. S., 366, where the authorities are collected and reviewed.

However this may be in the absence of a constitutional limitation, it seems to us there is no room for argument that under our constitution no power exists in the legislature to exempt by contract, commutation, or otherwise, any property whatever, except certain classes specially enumerated therein, from bearing its just proportion of the burdens of government. The provisions of the constitution are mandatory, that all taxation shall be equal and uniform, and the legislature shall prescribe regulations for a just valuation of all property for taxation, excepting only the enumerated classes. The language of the constitution is plain, simple, and easily understood, and manifestly operates as an absolute inhibition against the exemption, either directly or indirectly, of any property from taxation, except that specially enumerated. In *Crawford v. Linn County*, 11 Or. 494, Waldo, C. J., in speaking of the effect of the latter clause of section 1, article 9, of the constitution, says it "actually forbids the exemption from taxation of any property whatever, except that specially enumerated in the clause." See, also, *Chesapeake etc. R. R. Co. v. Miller*, 19 W. Va. 408; *Huntington v. Worthen*, 120 U. S. 97; *Zanesville v. Richards*, 5 Ohio St. 589; *People v. McCreery*, 34 Cal. 432; *People v. Eddy*, 43 Cal. 331; 13 Am. Rep. 143; *Fletcher v. Oliver*, 25 Ark. 289; *Nashville R. R. Co. v. Wilson Co.*, 89 Tenn. 597.

While counsel for plaintiff frankly admit that the legislature had no power under the constitution to exempt the property of their client from taxation, they urge ³⁴² that section 11 of the act of 1874 is not an exemption of the property from taxation, but a commutation of the taxes, for what the legislature determined to be an adequate equivalent, and therefore is not obnoxious to the constitutional provisions. A sufficient answer to this position is that the legislature cannot do indirectly what it is prohibited from doing directly. The right to commute is simply an incident of the right to exempt, and the denial of the power to exempt must necessarily preclude the existence of the power to commute. As was said by White, J., in *Louisiana Cotton Mfg. Co. v. City of New Orleans*, 31 La. Ann. 440, the right to commute may be said to be "a payment of a designated sum for the privilege of ex

emption, or the selection in advance of a specific sum in lieu of an *ad valorem* tax. If the first, it is indubitably an exemption; if the second, then it is a specific tax, and hence violates the rule of *ad valorem*, which prescribes that all property shall be taxed according to value." Either view is fatal to plaintiff's contention in this case. The constitution absolutely prohibits the exemption of any property, except for municipal, educational, literary, scientific, religious, or charitable purposes, and as no part of plaintiff's property is included within any of these enumerated classes, any law which attempts to exempt it from taxation is void. And "any law which indirectly produces such exemption must be equally void; that cannot be accomplished indirectly which the organic law declares shall not be done directly": Mr. Justice Field, in *Huntington v. Worthen*, 120 U. S. 97.

The provisions of our constitution were manifestly intended to require and insure equality in the manner and mode of the assessment, and the levy and collection of taxes for the support of the government, and to impose an equal proportion of these burdens upon all persons within the limits of the taxing district; and to that end prohibited special or class legislation of the character sought to be upheld in this case. If the legislature can, ²⁴² for any consideration it may deem adequate, exempt or commute the taxes on one class of property, or on the property of one taxpayer, it can do the same with any or all property, and the proportion of the burden of maintaining the government borne by any taxpayer will depend, not on the amount or value of his property, but upon his success in securing advantageous legislation. If such a doctrine should be recognized by the courts, the constitution will put no hinderance to rich and powerful corporations or rich men making contracts with the legislature for perpetual exemption from all the burdens of supporting the government, and the property owner who is unable to obtain such contracts or commutation will be compelled alone to bear such burdens. "The result of such a principle," says Mr. Justice Miller, "under the growing tendency to special and partial legislation, would be to exempt the rich from taxation, and cast all the burden of supporting the government and the payment of its debts on those who are too poor or too honest to purchase such immunity": *Washington University v. Rouse*, 8 Wall. 444. A construction of the constitution which would

permit or allow opportunities for such manifest injustice, cannot receive the sanction of this court.

So obviously unconstitutional is the provision of the act of 1874, which attempts to relieve the plaintiff from the payment of any state or county taxes on its property for a designated period, in consideration of its agreement to convey the troops and munitions of war of the state over its road, that it seems almost unnecessary to cite authorities in support of that position; but, as showing the construction put upon similar constitutional provisions by the courts of other states, reference will be made to some of the adjudged cases. In *Memphis etc. R. R. Co. v. Gaines*, 3 Tenn. Ch. 604, and *Ellis v. Louisville etc. R. R. Co.*, 8 Baxt. 530, under a constitution providing that "all property shall be taxed according to its value," to be "ascertained in such manner as the legislature ³⁴⁴ shall direct, so that taxes shall be equal and uniform," it was held that an act of the legislature providing that any railroad company which would accept certain amendments to its charter, and pay annually to the treasurer of the state, to be in full of all taxation, a certain per cent of its gross receipts, should be exempt from any further taxation, was unconstitutional and void. And these decisions were affirmed by the supreme court of the United States in *Railroad Co. v. Gaines*, 97 U. S. 697. So in *State v. Hannibal etc. R. R. Co.*, 75 Mo. 208, under a constitution providing that "all property subject to taxation ought to be taxed in proportion to its value," and that "no property, real or personal, shall be exempt from taxation," it was held that a contract between a municipality and a railroad company, that the municipality should relinquish and forego all right or claim to tax the property of the corporation, in consideration that it should locate and maintain its general office and machine shops within the corporate limits, and pay annually to the corporation seven hundred dollars in money, was in violation of the constitution, and void. And again, in *City of New Orleans v. Lafayette Ins. Co.*, 28 La. Ann. 756, under a constitution that all "taxation shall be equal and uniform throughout the state," and all property "shall be taxed in proportion to its value," an act of the legislature providing that all insurance companies doing business in the state shall pay an annual license tax of one thousand dollars, which "shall be deemed a full acquittance for all taxes imposed by state, parish, or municipal authority for the year for which said one thousand dollars is paid, ex-

cept taxes on real estate owned by said company," was declared to be in violation of the constitution, and did not prevent the taxation of the property of an insurance company. To the same effect see *City of New Orleans v. New Orleans Sugar Shed Co.*, 35 La. Ann. 548; *Chattanooga v. Nashville etc. R. R. Co.*, 7 Lea, 561.

The case of *Hunsaker v. Wright*, 30 Ill. 146, cited and ²⁴⁵relied on by counsel for plaintiff, holding that under a constitution providing that "the legislative assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property," it is competent for the legislature to commute a tax for a payment of money, or other equivalent, and that it is the sole judge of the propriety and value of such equivalent, does not commend itself to us as being supported by either reason or authority. The court, after declaring that the design and object of the constitution is to impose an equal proportion of the burdens of taxation upon all persons, and that the legislature has no power to exempt or release any person from his proportionate share of this burden, proceeds to hold that this design is not violated by the commutation of the tax for any consideration by the legislature deemed sufficient. To such a doctrine we are unable to subscribe. It seems manifest to us that the very object and design of the constitution, as stated by the court—an equal and just distribution of the burdens of taxation—is plainly violated by the conclusion reached by the court in that and other Illinois cases holding the same doctrine. But whether this is true or not, the Illinois constitution is radically different from ours, and hence the cases from that state are not in point in this discussion.

In declaring unconstitutional section 11 of the act of 1874, which attempts to relieve the plaintiff from the payment of any taxes on its property in consideration of its agreement to carry the troops and munitions of war of the state, we are not unmindful of the respect due a co-ordinate branch of the government, or the hesitancy with which a court always approaches the question of holding a legislative act void. But, as said by Chancellor Kent, "the courts of justice have a right and are in duty bound to bring every law to the test of the constitution, and to regard the constitution as the paramount law, to which every inferior or derivative power and regulation ²⁴⁶ must conform. The constitution is the act of

the people, speaking in their original character, and defining the permanent conditions of the social alliance, and there can be no doubt on the point, with us, that every act of the legislative power contrary to the true intent and meaning of the constitution is absolutely null and void": 1 Kent's Commentaries, 450. Hence, when it appears to a court that the legislature has plainly violated the paramount law of the land, as in this case, this court would be unworthy of its high station and the solemn obligation that station imposes should it hesitate to so declare.

The decree of the court below is therefore reversed, and the complaint dismissed.

TAXES—CONSTITUTIONALITY OF STATUTE EXEMPTING FROM, FOR PUBLIC SERVICE.—This question will be found fully treated in *Commonwealth v. Ma. Hobbs*, 90 Ky. 384, 29 Am. St. Rep. 382, and extended note, and the extended note to *Mott v. Pennsylvania R. R. Co.*, 72 Am. Dec. 683. It has been held in California that under section 13 of article 11 of the constitution, which declares that "all property in this state shall be taxed in proportion to its value," the legislature has no power to exempt from taxation any species of private property however owned: *Minturn v. Hays*, 2 Cal. 590; 56 Am. Dec. 366; *People v. Eddy*, 43 Cal. 331; 13 Am. Rep. 143.

SAVAGE v. CITY OF SALEM.

[23 OREGON, 381.]

STREETS, NUISANCES IN.—Any unauthorized permanent erection or structure materially encroaching upon a public street or highway, or impeding or interfering with travel, is a nuisance *per se*, and may be abated, though ample space is left for the passage of the public.

STREETS—LICENSE TO OBSTRUCT.—Municipal authorities have power to authorize and render lawful obstructions and erections in the streets for a public purpose which would otherwise be deemed nuisances, on the ground that this is merely putting the street to a new and improved use as demanded by the necessities of the times, and modern conveniences and appliances.

STREETS, POWER OF MUNICIPALITY TO AUTHORIZE OBSTRUCTIONS IN.—A municipal corporation has no power to authorize private persons or corporations to erect or maintain permanent obstructions in the public streets for purely private purposes; but it may authorize such obstructions for the purpose of serving the public for private gain, and in such case, although such structures may in fact be or become a public nuisance, and liable to abatement as such, they cannot be held to be a nuisance *per se*.

STREETS, NUISANCES IN.—WATER TANKS erected and maintained in the public streets by a private person for private gain, by the authority and permission of the municipality, at places designated and selected by its

agent and under his supervision, are not public nuisances *per se* if erected and maintained for a public purpose, such as street sprinkling, although they may become nuisances in fact by subsequent use.

STREETS, LICENSE TO USE—REVOCATION—NUISANCES.—After a municipality has granted a license or franchise to a person or corporation to occupy a portion of the street for a public purpose, such as the erection of water-tanks for street sprinkling, and the licensee has acted upon such grant, and expended money on the faith thereof, the city cannot revoke the grant without compensation to the owner, unless the structure so erected and so authorized is, or has become by subsequent use, an actual nuisance, and this is a question exclusively for the jury to determine.

ACTION to recover damages for the removal of water-tanks by a city after it had authorized their erection in the streets for the purpose of supplying the sprinkling-wagons of the plaintiff below, John Savage, with water for sprinkling the streets of the city. Judgment for plaintiff. The defendant appealed.

D'Arcy and Bingham, for the appellant.

Bonham and Holmes, for the respondent.

322 **BEAN, J.** On the 16th of February, 1887, the city of Salem, through its common council, authorized and empowered the plaintiff, under the supervision of its street supervisor, to erect and maintain water-tanks for the purpose of supplying his street-sprinkling wagons with water with which to sprinkle and allay the dust on certain of the principal streets of the city, for a compensation to be by him received from the adjoining property owners. Under this authority the two tanks in question were erected by plaintiff at the places designated by and under the supervision of the street supervisor, and were maintained and used by plaintiff for the purposes for which they were authorized, until June 7, 1891, when the council ordered and directed the street commissioner to remove the tanks, which was accordingly done after a refusal by plaintiff to remove them himself, whereupon this action was commenced to recover damages for such removal.

The contention for defendant is: 1. That the city had no power or authority to authorize the erection of these water-tanks in the streets, because they were to be used for private purposes, and were therefore nuisances *per se*, which could be abated at any time; and 2. If this is not so, the permission to so erect them was but a mere license, revocable at the pleasure of the city. At the outset it is well to note that this

case is unembarrassed by any question as to the right or remedy of an abutting property owner, or of a private individual who has suffered some injury special to himself, and not in common ²⁸³ with the public, from the erection or obstruction in question, but is solely a question between the municipality which authorized the alleged obstruction, and the licensee; hence, many of the authorities cited and relied on by the defendant are not applicable to the facts of this case, or in point, and the language of the opinions in these, as in all cases, must be interpreted in the light of the particular facts as presented to the court.

As a general rule, it has been said that "public highways belong, from side to side, and end to end, to the public": *State v. Berdett*, 73 Ind. 185; 38 Am. Rep. 117; Elliott on Roads, 478; hence any unauthorized permanent erection or structure which materially encroaches upon a public street or highway, and impedes or interferes with travel, is a nuisance *per se*, and may be abated as such, notwithstanding ample space is left for passage by the public. But it now seems settled that municipal authorities which possess under their charters general control over the streets, have the power to and may authorize, and render lawful, obstructions and erections therein for a public purpose which otherwise would be deemed nuisances, on the ground that such erections or structures are merely putting the street to a new and improved use, as demanded and required by the necessities of the times and the modern conveniences and appliances. It is upon this principle that the right to grant franchises authorizing the use of the streets for water and gas pipes, for the construction and operation of street railways, the erection of water-hydrants and lamp-posts, of telegraph, telephone, electric-light, and railway poles, and similar structures, is maintained and now generally recognized and upheld by the courts: 2 Dillon on Municipal Corporations, secs. 657-697; Keasby on Electric Wires, 86, 89; Thompson on Electricity, secs. 26, 28. Since a municipal corporation holds its control and power over the streets in trust for the public, it has no authority to authorize or permit private persons or corporations to erect or maintain permanent obstructions therein for purely private purposes: *Pettis v. Johnson*, ²⁸⁴ 56 Ind. 139; *Emerson v. Babcock*, 66 Iowa, 257; 55 Am. Rep. 273; *Farrell v. Mayer*, 5 N. Y. Supp. 672. But it may authorize such erections or structures by private persons or corporations for the purpose

of serving the public for private gain, and in such case, although such structures may in fact be or become a public nuisance, and liable to abatement as such, they cannot be held to be a nuisance *per se*. "It is a legal solecism to call that a public nuisance which is maintained by public authority": *Harris v. Thompson*, 9 Barb. 350. Hence, in *Commonwealth v. City of Boston*, 97 Mass. 555, it was held that the specifications and decision by the mayor and aldermen of a city through which the lines of an electric telegraph company pass, made and recorded, determining the kind and location of the posts of the company in a highway, are conclusive upon the rightfulness of their erection, so that they cannot be lawfully removed by the city or its officers, or treated in any manner as a public nuisance. So where a railroad company, under an act granting it power to construct its railroad on a public highway occupied a portion of the road, not exceeding the extent allowed by law, and obstructed travel on such portion, it was held not to be guilty of a nuisance: *Danville etc. R. R. Co. v. Commonwealth*, 78 Pa. St. 29. To the same effect is *Randle v. Pacific R. R. Co.*, 65 Mo. 325.

It follows, then, that the water-tanks in question having been erected by plaintiff by the authority and permission of the defendant at the places designated and selected by its agent and under his supervision, cannot be held to be public nuisances *per se*, if they were erected and maintained for public and not private purposes, and this depends upon whether sprinkling the streets of a municipality is a public purpose, or, in other words, a business in which the corporation itself may lawfully engage. There seems scarcely room for two opinions upon this point, so unquestionable is it that street sprinkling is a public purpose. As was said by Pierpont, J., in *West v. Bancroft*, 82 Vt. 371, in sustaining the right of ~~the~~ the city to construct a reservoir in a street for the purpose of retaining water to be used in sprinkling streets and extinguishing fires:

"All those acts which tend to facilitate travel, and add to the ease, comfort, and convenience of the traveler, or his beasts, whether it be by cutting down hills, filling ravines, paving roads, erecting watering-troughs, or sprinkling the streets, are acts which it is proper and often necessary for the public to do, . . . and perhaps no other one of these acts would add so much to the comfort of the passers on the highway, as well as all the inhabitants of the village, as that of

the sprinkling the streets." And in *State v. Reis*, 38 Minn. 371, it was held that street sprinkling is a "local improvement," for which an assessment may be levied upon the property fronting or abutting upon the street sprinkled in proportion to its lineal feet frontage; and in the course of the opinion, Mitchell, J., said "that street sprinkling is a public purpose, is unquestioned." So, too, a public pump in a street has been held not to be a nuisance to an abutting lot-owner, when maintained by the city authorities: *Los Tutter v. City of Aurora*, 126 Ind. 436. We conclude, therefore, that the water-tanks erected by the plaintiff were not nuisances *per se*, and could not be abated as such, and that whether they were or had become in fact nuisances, was a question for the jury, and its verdict is conclusive upon that matter.

Passing now to a consideration of the question as to the right of the city to revoke the license under which plaintiff erected the water-tanks, the rule seems to be that after a municipality has granted a license or franchise to a private person or corporation to occupy a portion of a street for public purposes, and the licensee has acted upon such grant, and expended money on the faith thereof, the city cannot revoke the license without compensation to the owner, unless the erection or structure so authorized is, or has in fact by subsequent use become, an actual nuisance: 1 Dillon on Municipal Corporations, 814; *Hudson Telephone Co. v. Jersey City*, 49 N. J. L. 303; 60 Am. Rep. 619; *Commonwealth v. City of Boston*, 97 Mass. 555. In this case, the question as to whether these water-tanks were, or by plaintiff's negligence had become, nuisances, was submitted to the jury, and their verdict being against the city, it was not justified in revoking the license and removing the tanks, and must respond in damages to plaintiff for so doing.

Judgment of the court below is therefore affirmed.

NUISANCES—OBSTRUCTIONS IN STREETS.—An obstruction in a street is ordinarily a nuisance if it interferes with its use by the public for travel and transportation: *Oallanan v. Gilman*, 107 N. Y. 360; 1 Am. St. Rep. 831, and extended note, especially at page 842 where the cases declaring that permanent structures obstructing streets are nuisances are collected; *Yates v. Town of Warrenton*, 84 Va. 337; 10 Am. St. Rep. 860. See, also, the note to *Jackson v. Kiel*, 16 Am. St. Rep. 209.

MUNICIPAL CORPORATIONS—POWERS IN GRANTING USE OF STREETS.—Municipal corporations have the power to determine to what extent streets may be obstructed: *Livingston v. Wolf*, 136 Pa. St. 519; 20 Am. St. Rep. 836, and note; *Cushing v. Boston*, 128 Mass. 330; 35 Am. Rep. 383, and note;

note to *State v. Berdette*, 38 Am. Rep. 123. The erection of telegraph or telephone poles in a public highway is not a nuisance when authorized by statute: *Chesapeake etc. Teleph. Co. v. Mackenzie*, 74 Md. 36; 28 Am. St. Rep. 219, and extended note. Under its charter the city of St. Louis has the power to regulate the use of its streets, and the power extends to new uses as they arise as well as to uses common and known at the time the charter was adopted: *St. Louis v. Bell Teleph. Co.*, 96 Mo. 623; 9 Am. St. Rep. 370. A city council has plenary powers over streets under the Indiana statutes, and may determine to what uses they shall be applied and to what extent and under what circumstances they may be encumbered: *Wood v. Mears*, 12 Ind. 515; 74 Am. Dec. 222, and note.

MUNICIPAL CORPORATIONS—RIGHT TO USE OF STREET WHEN A CONTRACT WHICH CITY CANNOT REVOKE.—This question will be found discussed in *Gregsten v. Chicago*, 145 Ill. 451; 36 Am. St. Rep. 496, and note where the cases are collected, and also in *Williams v. Citizens' Ry. Co.*, 130 Ind. 71; 30 Am. St. Rep. 201, and note.

BERNARD v. TAYLOR.

[23 OREGON, 416.]

WAGERS—VALIDITY OF.—Wagers of all kinds are inconsistent with the established interests of society, in conflict with the morals of the age, and void as against public policy.

ILLEGAL CONTRACTS—RESCISSIION.—While any illegal contract is executory the law will neither enforce it nor award damages, and the party paying the money or putting up the property may rescind the contract and recover back his money or property, but after the contract is executed nothing paid or delivered can be recovered.

WAGERS—RECOVERY.—Money or property deposited as a wager on a certain event may be recovered, if demanded by the owner before the event is decided.

Alfred F. Sears, Jr., McGinn, and Simon, for the appellant.

John Macmillan, and Miller and Miller, for the respondent.

419 LORD, C. J. This was an action to recover the sum of five hundred and sixty dollars, deposited with the defendant as a wager on the result of a footrace. The case was tried without the intervention of a jury, and the material facts as found by the court are: That the plaintiff deposited with the defendant the sum of five hundred and sixty dollars in gold for the benefit of one George Grant, and as a wager upon a footrace which said Grant and one Anderson were to run the next day at a place agreed upon; that at the time the said money was so deposited, it was understood by Grant and the defendant Taylor and the plaintiff that the money should be paid back to the plaintiff on his demand for the same at any time before the race should be run, which the defendant

agreed to do; that before such race was run the plaintiff on two occasions demanded said money of the defendant, who refused to pay it back, but pretends that said race was run, and that Anderson was the winner, to whom he paid the money before the commencement of this action; that the race agreed to be run was not run, but that ⁴²⁰ Grant, at the appointed time, refused to run, and Anderson ran over the course alone, and was declared by the defendant to be the winner; that said pretended race was never intended to be a fair and honest race, and that plaintiff knew at the time he deposited his money with the defendant that the race was to be a "bogus race"; that the parties engaged in getting it up, namely, Grant, Anderson, and the defendant, wanted to "rope in" somebody; that it was understood that Grant was to win the race; that the plaintiff furnished the money and deposited it with the defendant as stakeholder for the benefit of Grant, in whom he had confidence at the time, but of whom, before the time appointed for the race to come off, he became suspicious; that he feared he would lose the money, and thereupon, by reason of such suspicion, and by virtue of the agreement with the defendant, demanded of the defendant the return of said money, and that said Grant then and there, before the time of running the race had arrived, demanded of the defendant the repayment of the money to the plaintiff, etc. Substantially upon such findings, the court found as a conclusion of law that the plaintiff was entitled to judgment for the sum of five hundred and sixty dollars and interest, and for costs, etc. From this judgment, the appeal has been brought to this court.

1. The first contention for defendant is, that wagers or wagering contracts upon indifferent subjects are valid in this state by force of the common law, except when prohibited by statute. There can be no doubt that wager contracts upon indifferent matters were valid at common law: *Good v. Elliott*, 3 Term Rep. 693; *Jones v. Randall*, 1 Cowp. 37; *De Costa v. Jones*, 2 Cowp. 734; *Bunn v. Riker*, 4 Johns. 427; 4 Am. Dec. 292. But all wagers which tendered to a breach of the peace, or to injure the feelings, character, or interests of third persons, or which were against the principles of morality, or of sound policy, were void at common law: 4 Kent's Commentaries, 466; Greenhood's Public Policy, 226. And all wagers in contravention ⁴²¹ of the positive provisions of any statute are also void.

Of late years, by legislation and judicial decision, the hostility to wagers of every nature has been marked. This is doubtless due to the increase of betting and the evil consequences resulting therefrom. As O'Neal, J., said: "Every bet tends directly to beget a desire of possessing another's money or property without an equivalent. Men acted upon by such influences easily become gamblers, and then the road to every other vice is broad and plain": *Rice v. Gist*, 1 Strob. 84. And the tendency of judicial opinion in repudiating all kinds of wagers is well illustrated in *Love v. Harvey*, 114 Mass. 82, wherein Gray, C. J., says: "It is inconsistent with the policy of our laws and with the performance of duties for which courts of justice are established that judges and juries should be occupied with every frivolous question upon which idle and foolish persons may choose to lay a wager." Equally emphatic is Belford, J., in *Eldred v. Malloy*, 2 Col. 321, 25 Am. Rep. 752, wherein he says: "If we enter upon the work of settling bets made by gamblers in one case, . . . we may despair of ever finding time for the dispatch of these weightier matters which affect the person and property rights of the respectable people in this territory. If the gate is once opened for this kind of litigation, it is more than probable we may be overrun with questions arising out of bets. The spirit of our laws discountenances gambling." Wagers are inconsistent with the established interests of society, and in conflict with morals of the age, and as such they are void as against public policy. In view of these considerations, we do not think that such transactions, though upon indifferent subjects, are valid in this state.

2. The next contention for the defendant is, that the alleged agreement was corrupt, illegal, and criminal in this, that it was in advance "fixed" that one of the parties should win, and that certain persons should lose their money; in other words, that the agreement had in contemplation "a job race." This, it is claimed, put the ⁴³³ plaintiff *in pari delicto* with the defendant, and as a consequence he is entitled to the benefit of the rule *potior est conditioni possidentis*. The general rule is, that the law will not interfere in favor of either party *in pari delicto*, but will leave them in the condition in which they are found, from motives of public policy. There is no doubt, where money has been paid on an illegal contract which has been executed, and both parties are *in pari delicto*, the courts will not compel the return of the money so

paid. But the cases show that an important distinction is made between executory and executed illegal contracts. While the contract is executory the law will neither enforce it nor award damages, but the party paying the money or putting up the property may rescind the contract and recover back his money. If the contract is already executed, nothing paid or delivered can be recovered back. This arises out of a distinction between an action in affirmance of an illegal contract and one in disaffirmance of it. In the former such an action cannot be maintained, but in the latter an action may be maintained for money had and received. The reason is that the plaintiff's claim is not to enforce, but to repudiate, an illegal agreement: Wharton on Contracts, sec. 354. In such case there is a *locus penitentiae*; the wrong is not consummated, and the contract may be rescinded by either party.

In *Edgar v. Fowler*, 8 East, 225, Lord Ellenborough said: "In illegal transactions the money has always been stopped while it is *in transitu* to the person entitled to receive it." As Lord Justice Mellish said: "To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any steps. If money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce ⁴²³ the illegal transaction, in neither can he maintain an action; the law will not allow that to be done": *Taylor v. Bowers*, 1 Q. B. Div. 291.

In *Hastelow v. Jackson*, 8 Barn. & C. 221, which was an action by one of the parties to a wager on the event of a boxing match, commenced against the stakeholder after the battle had been fought, Littledale, J., said: "If two persons enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards": *Smith v. Bickmore*, 4 Taunt. 474; *Tappenden v. Randall*, 2 Bos. & P. 467; *Lowry v. Bourdieu*, 2 Doug. 468; *Munt v. Stokes*, 4 Term. Rep. 561; *Utica Ins. Co. v. Kip*, 8 Cow. 20; *Merritt v. Millard*, 4 Keyes, 208; *White v. Franklin Bank*, 22 Pick. 181; *O'Bryan v. Fitzpatrick*, 48 Ark. 490. "And this rule," says Mr. Justice Woods, "is applied in the great majority of the cases, even when the par-

ties to an illegal contract are *in pari delicto*, because the question which of two parties is the more blamable is often difficult of solution, and quite immaterial": *Spring Co. v. Knowlton*, 103 U. S. 60. The object of the law is to protect the public, and not the parties. This is upon the principle that it best comports with public policy to arrest the illegal transaction before it is consummated: *Stacy v. Foss*, 19 Me. 335; 36 Am. Dec. 755.

3. It only remains to apply these principles to the facts. These show that the plaintiff was cognizant that the race had been fixed in advance—that one of the parties should win, and that certain other persons should lose their money; that it was a bogus race, and the arrangement based upon it corrupt, and designed to cheat and defraud the other parties; but at the same time they show that he repented, and repudiated the transaction before it was consummated, by demanding the return of his money the evening of the day before the race, and on the day of the race, but before it was to come off, and that the defendant refused to pay it back, and that he afterwards forbade the defendant to pay said money to any other person ⁴³⁴ than himself. He availed himself of the opportunity which the law affords a person to withdraw from the illegal contract before it has been executed; he repented before the meditated wrong was consummated, and twice demanded to withdraw his money, and thereby rescinded the contract. To allow the plaintiff to recover does not aid or carry out the corrupt and illegal transaction, but the effect is to put the parties in the same condition as they were before it was determined upon. By allowing the party to withdraw, the contemplated wrong is arrested, and not consummated. This the law encourages, and no obstacle should be thrown in the way of his repentance. Hence, if the plaintiff retreated before the bet had been decided, his money ought to have been returned to him, and in default of this he is entitled to recover.

There was no error, and the judgment must be affirmed.

Wagers and Their Validity.*

DEFINITIONS AND EXAMPLES.—The wagers treated of in this note are contracts in which the parties in effect stipulate that they shall gain or lose upon the happening of an uncertain event, in which they have no interest except

* REFERENCE TO MONOGRAPHIC NOTES.

Wagers, actions on: 12 Am. Dec. 339, 340.

Wagers, validity of: 11 Am. Rep. 58, 59.

Wagers, dealings in futures on margin, validity of: 10 Am. St. Rep. 32, 34; 1 Am. St. Rep. 752-764.

that arising from the possibility of such gain or loss: *Kitchen v. Loudenback*, 48 Ohio St. 177-188; 29 Am. St. Rep. 540; *Gaw v. Bennett*, 153 Pa. St. 247; 34 Am. St. Rep. 699. To constitute such wager there must be a risk on both sides: *Quarles v. State*, 5 Humph. 561. Under the early common law all wagers were recoverable and valid except such as were prohibited by law, were against public policy, or calculated to affect the interest, character, or feelings of third persons. In other words, all wagers upon indifferent subjects were valid. Thus a wager by one of the litigants that an appeal from a decree in chancery would be reversed by the house of lords was held not of itself illegal as against morality or sound policy: *Jones v. Randall*, 1 Cowp. 37, or that a third person had purchased a wagon of a fourth: *Good v. Elliott*, 3 Term Rep. 693, or as to the name of a person whom the parties had seen: *Bland v. Collet*, 4 Camp. 157, or that one of the parties was older than the other: *Hussey v. Crickitt*, 3 Camp. 168, or as to which of two persons not parties to the wager would die first: *Earl of March v. Pigot*, 5 Burr. 2802, or as to the result of a horserace: *Beeston v. Beeston*, L. R. 1 Ex. D. 13; but a sweeping English statute, 8 & 9 Vict., c. 109, now makes all such wagers void: *Fitch v. Jones*, 5 El. & B. 238.

Even under the old common law a wager upon the sex of a child expected to be born was void: *De Costa v. Jones*, 2 Cowp. 729, or respecting the future amount of a branch of the public revenues: *Atherfold v. Beard*, 2 Term Rep. 610, or that one of the parties would not marry within a certain number of years: *Hartley v. Rice*, 10 East, 22, or upon a question of law: *Henkin v. Guersa*, 12 East, 247, or as to when a certain person would die: *Gilbert v. Sykes*, 16 East, 150, or that a third person will travel in a particular carriage only: *Ellham v. Kingsman*, 1 Barn. & Ald. 683, or as to the conviction or acquittal of a person on trial on a criminal charge: *Evans v. Jones*, 5 Mees. & W. 82, or as to the manner in which a certain prohibited game should be played: *Brown v. Leeson*, 2 H. Black. 43, or as to who would win a boxing match: *Hastelow v. Jackson*, 8 Barn. & C. 221. All these wagers were held void on the ground that while not prohibited by express statute they were nevertheless illegal as affecting the feelings or character of third persons, or contrary to public peace, good morals, or public policy. While the rule of the common law has been recognized in many of the American cases, it has been adopted in but few, and then only with extreme regret.

An increase in betting has brought about a decided change in judicial opinion everywhere, and a pronounced hostility is expressed to wagers of every kind. The trend of opinion in the last fifty years has been to discourage wagers of every nature as being opposed to public policy and the morals of the age. This is true, independent of statutory regulations, as will be shown by the numerous cases which follow in the consideration of the subject under examination.

The feeling of hostility to the validity of wagers in America is well illustrated by the remarks of a number of the courts of last resort. Thus Chief Justice Eddy in *Stoddard v. Martin*, 1 R. I. 1, 19 Am. Dec. 643, said, "it is admitted that by the common law some wagers are legal, and may be enforced in a court of justice. This admission is made with regret in many of the modern decisions, and were the question *res integra* there is little doubt that all wagers would now be declared illegal. Among wagers deemed illegal are those against sound policy, or of immoral tendency, which may affect the feelings, interest, or character of a third party, or tend to disturb the peace of society." "Notwithstanding the fact that contracts of wager have been regarded as valid at common law, a disposition has been steadily

growing in all respectable courts to discountenance and ignore them. It is generally conceded that the principle was ingrafted on that system at a time when but little consideration was given to the subject, and the right to recover in such cases quite fully established before any searching inquiries were made in the moral tendencies of the doctrine. While bowing to the authority of Lord Mansfield, such able jurists as Ellenborough, and Campbell and Le Blanc have declined to entertain such cases, while other judges have refused to proceed as long as anything else could be found to do constantly declaring that were the question a new one the rule would be different. The manifest disfavor extended to these contracts by the English judges, and the unremitting efforts that are being made to get rid of a rule established through the inadvertence of their predecessors, convinces me that in upholding these contracts, the earlier decisions were founded on a misapprehension of the common law. The courts have enough to do without devoting their time to the solution of questions arising out of idle bets made on dog and cock fights, horseraces, the speed of ox teams, the construction of railroads, the number on a dice, or the character of a card that may be turned up.

"If we enter upon the work of settling bets made by gamblers we may despair of ever finding time for the dispatch of those weightier matters which affect the personal or property rights of respectable people. If the gate is once opened to this kind of litigation it is more than probable that we may be overrun with questions arising out of bets. The spirit of our laws discountenances gambling. Penalties are prescribed against gaming, and I can see no difference in principle in the bet that the faro-dealer will turn up a jack the next turn and the bet that the railroad will be built to Table mountain in so many days. It would be an anomaly in law to punish a man for the one bet and reward him for the other. Appreciating the regrets of the English judges over the establishment of a wrong rule in Great Britain we are in favor of making a correct start here, and accordingly hold that no wagering contract is enforceable"; *Eldred v. Malloy*, 2 Col. 320-322, 25 Am. Rep. 752. "It is inconsistent alike with the policy of our laws and with the performance of the duties for which courts of justice are established, that judges and juries should be occupied in answering every frivolous question upon which idle or foolish persons may choose to lay a wager"; *Love v. Harvey*, 114 Mass. 80. The supreme court of California, after stating the common-law rule, proceeds to say: "The tendency of the courts everywhere is to restrict rather than enlarge the rule, and it has often been regretted by the judges, even in England, that such actions ever should have been maintained in the courts of justice. As observed already at common law, no action in affirmance of a contract of wager made against good morals or sound public policy was maintainable, and such in our opinion was the nature of the wager in this action (wager on a horserace). Indeed, if the question were a new one in this state, we should be inclined to hold all wagers contrary to good morals and sound public policy, and therefore invalid"; *Gridley v. Dorn*, 57 Cal. 78; 40 Am. Rep. 110. No better portrayal of the evil consequences arising from tolerating gambling or betting in any form or on any subject can be found than that given in *Rice v. Gist*, 1 Strob. 84, where it was said that: "Every bet tends directly to beget a desire of possessing another's money or property without an equivalent. Men acted on by such influences may easily become gamblers and then the road to every other vice is broad and plain." . . . "I am prepared hereafter to declare all wagers unlawful on their clear immoral tendency, and thus to sweep from our courts the whole

body of wagers great and small." As said before, the tendency of all modern adjudication is to condemn all wagers of every kind on any subject as void and unenforceable because directly opposed to public policy and good morals. In a great majority of the states all wager contracts have been expressly repudiated by the courts as void, whether the parties have any interest in the event beyond what is created by the wager or not: *Perkins v. Eaton*, 3 N. H. 152; *Holt v. Hodge*, 6 N. H. 104; 25 Am. Dec. 451; *Love v. Harvey*, 114 Mass. 80; *West v. Holmes*, 26 Vt. 530; *Lewis v. Littlefield*, 15 Me. 233; *Gilmore v. Woodcock*, 69 Me. 118; 31 Am. Rep. 255; *Jefrey v. Ficklin*, 3 Ark. 227; 36 Am. Dec. 456; *Bunn v. Eiker*, 4 Johns. 426; 4 Am. Dec. 292; *Mount v. Waite*, 7 Johns. 434; *Edgell v. McLaughlin*, 6 Whart. 176; 36 Am. Dec. 214; *Cleveland v. Wolff*, 7 Kan. 184; *Wilkinson v. Tousey*, 16 Minn. 299; 10 Am. Rep. 139; *Shannon v. Baumer*, 10 Iowa, 210; *Bledsoe v. Thompson*, 6 Rich. 44; 57 Am. Dec. 777; *Deaver v. Bennett*, 29 Neb. 812; 26 Am. St. Rep. 415; *Wheeler v. Spencer*, 15 Conn. 28; *Irwin v. Wilkar*, 110 U. S. 499-510.

"The uniform tendency of the later decisions is to treat all gaming contracts and all wagers as utterly void. We feel ourselves authorized to conform our decisions to the public policy and to the sense of morality which the modern decisions and the modern legislation on the subject of gaming and wagers so clearly indicate. We find that the ancient rule of the common law was subject to certain exceptions; and in proportion as the courts have considered these questions, these exceptions to the ancient rule have been adjudged to be more and more comprehensive in their embrace until, as has been said, the exceptions to the rule have taken the place of the rule itself. We think that in the true spirit and meaning of the exceptions to the old rule, all idle wagers and all gaming contracts may be properly held to be void: 1. Because it is contrary to sound public policy that courts of justice should be required to enforce contracts into which there does not enter the element of a good or valuable consideration in the just sense of these words. What consideration is it for the payment of a thousand dollars that one man shall leap farther than another at three leaps? If A agrees with B that he will pay him a thousand dollars if a certain horse belongs to C, but if the horse belongs to B, then B shall pay A the like sum, where is the consideration of such a contract? There can be no consideration but the mutual risk to which each party subjects himself. And can it be said to be sound public policy to permit parties to take such risks upon such trifling and frivolous issues? We think not. 2. We think that it certainly tends to the detriment of the public that the time of the courts should be consumed in the investigation of the most idle or frivolous matters, about which the parties who lay the wager have no interest, to the delay of causes of the greatest magnitude perhaps, and certainly to the delay of the ordinary business transactions of life. Lastly, because a great majority of wagers are immoral in their tendency in a plain and direct sense, and they all beget a desire to possess another's money or property without an equivalent; and this, if not an immorality in itself, opens the way to vice. It might not attract much attention for this court to render a judgment against a man for a thousand dollars lost at tenpins, or on the turn of a card, or on the issue of a fight between two dogs; but if a dozen such judgments should be rendered at every term of this court for the next five years, it would be a blot upon the jurisprudence of the state, from which it would not recover in half a century; and it might present to the people the spectacle of the courts prostituted to the odious instrumentality of stripping women and

children of the common comforts of life because some one who owed them support and protection had been capricious enough to stake his substance upon a wager that he could throw a stone a thousand feet. In the case of *Conner v. Mackey*, 20 Tex. 747, this court held that money won at a game with cards called poker could not be recovered, and the decision was put on the general ground that gaming with cards tends to immorality: See also the case of *Norvell v. Oury*, 13 Tex. 31. We can perceive no difference in principle between the case of *Conner v. Mackey*, 20 Tex. 747, and this case. It is true that the game of tenpins is a licensed game, but it is not licensed for the purpose of gambling. The whole of our legislation on the subject of gaming shows that it has always been the policy of this state to prohibit and punish it. We cannot see, therefore, that a wager upon a game licensed by law stands on any different footing from a wager upon any indifferent matter. This court has sustained wagers upon horseraces, upon the idea that they rested upon somewhat different grounds, as respects their policy, from other wagers. It may be too late to question the wisdom and soundness of those decisions. But we are not disposed to go any further in sustaining actions upon wagers, or to recover money or property won upon any game or wager": *Monroe v. Smelly*, 25 Tex. 588; 78 Am. Dec. 541. A wager as to whether or not a certain execution can be collected is void as against public policy: *Boughner v. Meyer*, 5 Col. 71; 40 Am. Rep. 139. In this case the court said: "That a wager that a certain execution will not be collected is in contravention of sound policy we entertain no doubt. The moment such a wager is made, the one party has a pecuniary interest which might influence him to interfere with the due administration of justice by seeking to defeat the process of the court. To hold that such a wager is valid is to encourage unwarranted intermeddling with the mandates of judicial tribunals."

Early cases in California and Illinois maintain the common-law rule that all wagers not prohibited by law or against public policy or calculated to affect the interest, character, or feelings of third parties are valid, and may be recovered. Hence a wager as to whether or not a certain railroad will be completed within a certain time has been held to be valid and recoverable: *Johnson v. Fall*, 6 Cal. 359; 65 Am. Dec. 518; *Beadles v. Bless*, 27 Ill. 320; 81 Am. Dec. 231. We apprehend, however, that were the same question now presented to the court in either state, such cases would be overruled and the wager held void, for, as was said in *Gridley v. Dorn*, 57 Cal. 78, 40 Am. Rep. 110: "If the question were a new one in this state, we should be inclined to hold all wagers contrary to good morals and sound public policy, and therefore invalid." While in *Gregory v. King*, 58 Ill. 169, 11 Am. Rep. 56, the court did not hesitate to overrule *Smith v. Smith*, 21 Ill. 244, 74 Am. Dec. 100, and *Morgan v. Pettit*, 3 Scam. 529, in deciding that a wager on the result of a public election in or out of the state was absolutely void.

Wagers on Horseraces.—The better considered cases decide that wagers upon the result of a horserace are against good morals and sound policy, and for this reason illegal and void: *Gridley v. Dorn*, 57 Cal. 78; 40 Am. Rep. 110; *McLain v. Huffman*, 30 Ark. 423; *Morgan v. Beaumont*, 121 Mass. 7; *Cleveland v. Wolf*, 7 Kan. 184; *Wilkinson v. Tousley*, 16 Minn. 399; 10 Am. Rep. 139; *Corson v. Neathery*, 9 Col. 212. In the late case of *Deaver v. Bennett*, 29 Neb. 812, 26 Am. St. Rep. 415, the court said, "The rule at common law was that all wagering contracts that were contrary to good morals or public policy were illegal, and void. The courts of England at an early day held that betting on a horserace was not opposed to good morals.

The courts of that country reluctantly followed this early precedent until the common-law interpretation of wagering contracts was changed by the statutes of 8 and 9 Victoria which made all contracts of wager void. Is betting on the result of a horserace contrary to good morals? We are not bound by the decisions of the courts of England in determining that question. Whether a thing in the eyes of the law is moral or immoral may depend largely upon where and when it occurred. An act may be upheld as moral in one country and may be regarded as immoral in another. A wager contract might have been sustained a hundred years ago as being in conformity with good morals and be condemned to-day as immoral. In this country betting on a horserace is now generally regarded as against sound morals. As a general rule, the courts of this country, in the more recent decisions, have refused to enforce all wagering contracts even though they are not declared illegal by statute. Such contracts are certainly against good morals, a detriment to society, and, under the principles of the common law, are illegal and void." Pools on a horserace come within the same rule, and are void as wagering contracts: *Barker v. Mosher*, 60 N. H. 73. These cases all admit that under the rule prevailing at the early common law, wagers on horseraces were valid, and might be recovered after the event was decided, and the common-law rule has been adopted reluctantly in some of the states, as in Texas, where a line of decisions maintain that wagers on horseraces are not opposed to morality, public policy, or decency, and may be enforced: *Dunman v. Strother*, 1 Tex. 89; 46 Am. Dec. 97; *McElroy v. Carmichael*, 6 Tex. 454; *Kirkland v. Randon*, 8 Tex. 10; 58 Am. Dec. 94; *Wheeler v. Friend*, 22 Tex. 683; *Walker v. Armstrong*, 54 Tex. 609; although, as we have already seen, every other sort of wager is condemned and held void in that state: *Monroe v. Smelly*, 25 Tex. 586; 78 Am. Dec. 541. The common-law rule holding wagers on horseraces to be valid has, however, been adopted in some other states: *Grayson v. Whitley*, 15 La. Ann. 525; *Ross v. Green*, 4 Harr. 308; *Barret v. Hampton*, 2 Brev. 228. A prize or purse offered for a horse that will trot in the best time less than a given speed or will win a race is not a wager, and may be enforced, as it lacks the elements of chance of gain or risk of loss which characterizes a bet: *Misner v. Knapp*, 13 Or. 135; 57 Am. Rep. 6; *Doller v. Plymouth County Agricultural Society*, 57 Iowa, 481; *Porter v. Day*, 71 Wis. 296.

Election Wagers.—All wagers of every kind and nature on the result of a public election, whether local, general, or national, and whether made before the election or after the vote is cast and before the result is known, are universally condemned as opposed to sound policy and public morals. The cases are legion in which such wagers have been decided to be null and void regardless of the form of the wagering contract: *Rust v. Gott*, 9 Cow. 169; 18 Am. Dec. 497; *Lausling v. Lausling*, 8 Johns. 454; *Bruck v. Keeler*, 5 Wend. 250; *Bunn v. Riker*, 4 Johns. 426; 4 Am. Dec. 292; *Foreman v. Hardwick*, 10 Ala. 316; *Wheeler v. Spencer*, 15 Conn. 28; *Gregory v. King*, 58 Ill. 169; 11 Am. Rep. 56; overruling *Smith v. Smith*, 21 Ill. 244; 74 Am. Dec. 100; *Schlosser v. Smith*, 93 Ind. 83; *Lloyd v. Leisenring*, 7 Watts, 294; *Smyth v. M'Masters*, 2 Browne (Pa.), 182; *Laval v. Myers*, 1 Bail. 486; *Willis v. Hoover*, 9 Or. 418; *Wroth v. Johnson*, 4 Har. & McH. 284; *Mackie v. Moore*, 2 Gratt. 257; *Porter v. Sawyer*, 1 Harr. (Del.) 517; *Hiser v. State*, 12 Ind. 330; *Worthington v. Black*, 13 Ind. 344; *Conner v. Ragland*, 15 B. Men. 634; *McAllister v. Hoffman*, 16 Serg. & R. 147; 16 Am. Dec. 556; *Murdoch v. Kilbourn*, 6 Wis. 468; *Johnston v. Russell*, 37 Cal. 670; *Hill v. Kidd*, 43 Cal. 615; *Ball v. Gilbert*, 12 Met. 397; *Patterson v. Clark*, 126 Mass. 531;

Petillon v. Hipple, 90 Ill. 420; 32 Am. Rep. 31; *Hickerson v. Benson*, 8 Mo. 8; 40 Am. Dec. 115; *Jeffrey v. Ficklin*, 3 Ark. 227; 36 Am. Dec. 456; *Tarleton v. Baker*, 18 Va. 9; 44 Am. Dec. 353; *Stoddard v. Martin*, 1 R. I. 1; 19 Am. Dec. 643, giving many strong and convincing reasons for the rule, that election wagers are everywhere illegal and unenforceable. In *Murdock v. Kilbourn*, 6 Wis. 468-470, the court said: "A most pernicious influence would be exerted upon our institutions of government, if the elections which the people make of their public officers should be made the instruments and occasion of gambling. Hence the courts of all our sister states have uniformly held such contracts to be contrary to the policy of our laws and consequently illegal. We have been unable to find an instance in which they have been enforced." The reason why wagers on the event of elections are illegal and void, was forcibly expressed by Chief Justice Shaw in delivering the opinion in *Ball v. Gilbert*, 12 Met. 397-400, as follows:

"The more precise question here is whether a wager upon the event of an election to a public office, depending upon popular suffrage, in this commonwealth, is valid, and constitutes a binding contract. It seems to us sufficient to state the question. The answer is too obvious to admit of doubt. And it seems to us that, upon principle, such a wager is equally void, whether it be upon the election of an officer of the United States, of the state government, of a county, town, parish, or other aggregate corporation depending on suffrage. The very theory of such popular institutions is that the person elected to office is placed there by the free choice of the majority of persons free to inquire and judge, free to will and determine, and free to act with parity and intelligence, uninfluenced and unseduced by interested, sinister, or corrupt motives. If the persons voting act otherwise, they act without regard to the fitness of the candidate or to their own sense of duty. Upon the practical maintenance of this theory in its purity and perfection, or as near an approximation to it as the infirmities and vices of society will admit, depend the utility, the safety, and stability of all popular institutions relying upon popular suffrage for their basis and operation. And it is obvious that the more general and extensive the right of suffrage is, the more easily it may be abused and perverted, and the more important it is that its purity should be guarded and preserved. The more general the right of suffrage the smaller the proportion of power which the vote of each carries—the more easily it is influenced, and if voters should ever become venial, the smaller the price at which each can be influenced or controlled. If one bet can be made on an election, many can be made. If small sums can be staked, large ones can. So that, on a great and exciting public election a large amount of money may depend on the result. All those who are acting together will have a common, and may have a large, pecuniary interest in the issue. And it is conformable to the most obvious principles of economy, and dictated by the common motive to human action—self-interest—that those who are to gain or lose a large sum of money upon the happening of an event which is contingent should make a reasonable outlay of money to influence and bring about that event. This, therefore, they will be likely to do, without regard to the social and political merits of the election. It may happen, in fact it does often happen, that a few thousand, or even a few hundred, votes may decide the election of a state, and the election of a state may decide that of the union. If a few thousand dollars will command or influence such a number of votes, would it not be presuming too much on pure, disinterested virtue to believe that they would not be applied? And such influence is to be brought to bear, not merely on the few hundreds or thousands who may turn

the scale, but upon the whole body of voters on both sides. But money may be applied to affect the result, not only in the coarse, palpable, and offensive form of bribery, by the direct purchase of votes, but in other modes quite as efficacious, and not less detrimental to the public interest. It may be applied by the managers of the respective parties to the provision of treats and other gratifications; to the opening of houses of entertainment, to which partisans may resort at free cost, where the passions may be stimulated, the moral sense perverted, and all idea of social duty and personal responsibility overwhelmed in mere blind partisan feeling and desire of triumph, which lose sight of the object for which the right of suffrage is conferred. An election so influenced could not be regarded as the expressed will of an intelligent constituency; it would violate the whole theory on which the right of suffrage is founded, and destroy the confidence of all judicious persons in that particular power of the people, which has been regarded as the principal security for permanent, regulated, constitutional liberty. If it be true that wagers on election would have any tendency to create such a pecuniary interest in their result, as we have no doubt they have, we can have no hesitation in saying that all such wagers are illegal and void."

STATE v. DUNN.

[23 ORSON, 562.]

FORGERY—WHAT MAY BE SUBJECT OF.—A writing void on its face cannot be the subject of forgery. While the writing alleged to be forged must, if genuine, have some legal efficacy, or be the foundation of some legal liability, yet it is not always necessary that it should be enforceable to be the subject of forgery. It is sufficient if it may be the basis of an action, or of such a character that it may defraud, or injuriously affect, the rights of another.

FORGERY OF NOTE BARRED BY LIMITATION.—A note which appears upon its face to be barred by the statute of limitations may be the subject of forgery.

Nathan D. Simon, and McGinn and Sears, for the appellant.

George E. Chamberlain, attorney general, and Wilson T. Hume, district attorney, for the respondent.

563 LORD, C. J. The defendant pleaded guilty to an indictment which charged that he, "on the fifteenth day of December, 1892, in the county of Multnomah, and state of Oregon, did willfully, knowingly, and feloniously utter and publish as true and genuine, to one W. G. Jenne, a certain false and forged writing and promissory note, knowing the same to be false and forged, the tenor, purport, and effect whereof is as follows:

“\$165.

PORTLAND, Or., December 14, 1882.

“Ninety days after date, without grace, we jointly and severally promise to pay to the order of R. H. Dunn one hundred and sixty-five dollars for value received, with interest from date, payable at the rate of ten per cent per annum until paid, principal and interest payable in ⁵⁶³ United States gold coin at the Ainsworth National Bank in Portland, Oregon; and in case suit or action is instituted to collect this note, or any portion thereof, we promise to pay such additional sum of money as the court may adjudge reasonable as attorney's fees in said suit or action.

“JONATHAN RICHARDSON,

“J. J. FISHER.’

—with intent to injure and defraud the said W. G. Jenne and other persons,” etc. Before judgment was rendered on defendant's plea of guilty he filed a motion in arrest of judgment, upon the ground that the facts stated in the indictment do not constitute a crime, which the court overruled, and thereafter sentenced him to imprisonment in the penitentiary.

It will be observed that nearly ten years have elapsed since said note became due, or a cause of action accrued thereon, and our statute prescribes that an action can only be commenced on a contract of this character within six years after the action has accrued: Hill's Code, sec. 6. Upon this state of the case the contention for the defendant is that the note set out in the indictment appears on its face to be barred by the statute of limitations, or not to be enforceable, and is therefore not such an instrument as can be the subject of forgery. The defendant is indicted under section 1808, Hill's Code, which provides that “If any person shall, with intent to injure or defraud anyone, falsely make, alter, forge, or counterfeit, . . . any promissory note, . . . or shall, with such intent, knowingly utter or publish as true and genuine any such false, altered, forged, or counterfeited record, writing, instrument, or matter whatever, shall be punished by imprisonment in the penitentiary not less than two nor more than twenty years.” By this section the uttering or passing, as well as the making, of a forged instrument, is declared a forgery. They are separate and distinct crimes, though both offenses are forgery. The ⁵⁶⁴ party uttering need not be the party who forged the instru-

ment. To make out the offense it is sufficient that the writing or instrument should be forged or altered; that the party uttering or passing it knew it to be false, altered, or forged; and that he should utter, or attempt to utter, it, with intent to injure or defraud some one.

As defined by Mr. Bishop, "Forgery is the false making, or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability": 2 Bishop on Criminal Law, sec. 523. "But," he further observes, "to constitute an indictable forgery, it is not alone sufficient that there be a writing, and that the writing be false; it must be also such as if true would be of some legal efficacy, real or apparent, since otherwise it has no legal tendency to defraud": 2 Bishop on Criminal Law, sec. 533. "This is on the principle," said Gregory, J., "that every man knows the law, and is able to appreciate the legal effect of the instrument; and therefore it cannot, in legal contemplation, defraud anyone": *Reed v. State*, 28 Ind. 397. Hence, a writing invalid on its face cannot be the subject of forgery, because it has no legal tendency to injure or defraud. But, while a writing that is void, or without legal efficacy on its face, cannot be the subject of forgery, it may, when it is shown by the averment of proper extrinsic facts, be capable of injury, or of affecting the rights of another. Of course, if the instrument is void or invalid on its face, and cannot be made good by averment, the crime of forgery cannot be predicated upon it. An indictment for forgery must, therefore, disclose an instrument which is calculated on its face to have some effect, or extrinsic facts must be alleged which will enable the court to see judicially its fraudulent tendency: See note to *Arnold v. Cost*, 22 Am. Dec. 306, 321. In this case the alleged invalidity of the note appears on its face, and arises from the fact that it is subject to the bar of the statute of limitations.

The contention is that the note is not enforceable on ~~see~~ account of the bar of the statute, and cannot, therefore, be the subject of forgery, because in such case there can be no legal tendency to injure or defraud another. This argument proceeds upon the principle that the note, if genuine, would be void and worthless, because the statute not only bars the remedy, but extinguishes and destroys the legal obligation, and consequently the note could not be the foundation of a criminal action for forgery. But we apprehend it is not ab-

olutely essential that a writing or note must be capable of enforcement to be the subject of forgery.

In *Hawkesward's case*, 1 Leach, 257, the defendant was indicted for forging a bill of exchange. The bill was not stamped, as required by the statute, which provided "that a bill without a stamp shall not be pleaded, or given in evidence, or be available, in law or equity." It was contended by counsel for the prisoner that "the writing was not a bill of exchange, but a piece of waste paper, incapable of becoming the subject of either fraud or felony; that the party who took it must at the time have known that it was not a legal bill of exchange, or he must have been grossly negligent, the defect being visible upon the face of it." But Buller, J., overruled the objection, on the ground that the stamp acts were merely revenue laws, and did not purport in any way to alter the crime of forgery, and that the effect of the stamp act saying that a bill without a stamp shall not be pleaded, or given in evidence, or be available, in law or equity, signified only that it should not be made use of to recover the debt. This, and other cases which might be cited, indicate that it is not absolutely essential for the writing or instrument to be enforceable at law to predicate forgery upon it. While it is true that a writing alleged to have been forged must, if genuine, have some legal efficacy, or be the foundation of some legal liability, yet it is not always necessary that it should be enforceable, to be the subject of forgery. It is sufficient if it may be the basis of an action, or is of such a character ^{see} that it may defraud, or injuriously affect the rights of another.

It is laid down as a fundamental principle that statutes of limitation affect the remedy, but not the merits; in other words, that they bar the remedy merely, but do not extinguish or destroy the obligation. Hence, the defense of the statute is a personal privilege, and no one can compel anyone to take advantage of it if he chooses not to: 13 Am. & Eng. Ency. of Law, 703-707. Mr. Woods says that "a rule of great importance is, that the bar of the statute must be interposed by the diligence of the debtor, and as early as possible, and usually, unless otherwise provided by statute, on the pleadings previously to the hearing, and that it will not be raised by the court unsolicited; and also, that the protection afforded by the statute may be waived by the debtor." "The law allows a man to be honest and to pay an honest debt, however stale and ancient it may be. He may inter-

pose the statute of limitations, but he may also waive it. The law does not compel him to resort to this defense, nor can others insist upon it for him": *Brookville Nat. Bank v. Kimble*, 76 Ind. 203. A note may be barred by the statute of limitations, and still support a judgment, if no defense be interposed. In this state, on contracts of this character, the statute only affects the remedy, and, in order to avail a party, must be pleaded, if it does not appear on the face of a complaint, or demurred to if it does. This being so, if an action should be begun on a note subject to the bar of the statute, the makers would be compelled to come into court and defend against it in order to avoid the recovery of a judgment upon it. This shows that such a note has some efficacy or validity, and is not wholly void, even though its collection might be defeated by such appearance in court, and it is, therefore, within the principle announced, the subject of forgery.

In *People v. Fadner*, 10 Abb. N. C. 462, it was objected that the indictment was void, for the reason that the note alleged to be forged was usurious and void on its face. ⁵⁶⁷ The court says: "The answer to this question would seem to be found in the answer to another, viz: would the maker of this note, if genuine, be compelled to defend in order to protect himself from judgment in an action founded upon it? If the note, in the form set forth in the indictment, be the subject of legal proceedings in which a judgment may be lawfully recovered against the maker on default, then he may be injured, within the meaning of the statute. It is an injury to be compelled either to defend a suit or suffer judgment." So, here, if the makers of the note set out in the indictment, if genuine, would be compelled to come into court and defend in order to protect themselves against a judgment in an action founded upon it, then such a note may be the subject of legal proceedings in which a judgment may be lawfully recovered against the makers on default, and they be injured, within the meaning of the statute. Such a note has sufficient efficacy or validity to sustain a judgment and create a lien upon the property of the makers, unless they come into court and defend against the action, as provided by the code. It is a writing, according to Mr. Bishop's definition, which, if genuine, might be of legal efficacy, or the foundation of a legal liability. It is not wholly void or absolutely worthless, but, as we have seen, might become the foundation of a valid judgment, and thus establish a legal liability. Such being the

case, the makers might be injured or prejudiced by it, "and that," said the judges in *King v. Ward*, 2 Ld. Raym. 1461, "makes the forgery an offense for which an indictment would lie at common law," and, as we think, under our statute.

The judgment is affirmed.

FORGERY—WHAT MAY BE THE SUBJECT OF.—Writings invalid on their face are not subjects of forgery: *Terry v. Commonwealth*, 87 Va. 672; extended notes to *Hendricks v. State*, 8 Am. St. Rep. 469, and *Arnold v. Cost*, 22 Am. Dec. 316, where the cases discussing this point are collected.

FORGERY—WHETHER INSTRUMENT MUST BE OF LEGAL EFFICACY.—To be the subject of forgery the writing must be in such form as to be apparently of some legal efficacy: *State v. Gryder*, 44 La. Ann. 962; 32 Am. St. Rep. 358, and note; *State v. Henn*, 39 Minn. 484; *Luttrell v. State*, 85 Tenn. 232; 4 Am. St. Rep. 760, and note with the cases collected: *State v. Johnson*, 26 Iowa, 407; 96 Am. Dec. 158, and note; notes to *Arnold v. Cost*, 22 Am. Dec. 314, and *Hendricks v. State*, 8 Am. St. Rep. 468.

HAHN v. GUARDIAN INSURANCE COMPANY.

[23 OREGON, 576.]

INSURANCE—ACTS OF AGENT, WHEN BINDING ON COMPANY.—The acts of an insurance agent performed within the scope of his apparent power bind his principal. Persons dealing with the agent, without knowledge of any limitations on his powers, are not bound to go beyond his apparent authority and inquire whether or not he is in fact authorized to do a particular act for his principal.

INSURANCE—AUTHORITY OF AGENT.—Persons having transactions with an insurance company which deals with the community through a local agent are entitled to assume, in the absence of knowledge as to the agent's authority, that his acts and declarations are as valid as if they proceeded directly from the company.

INSURANCE—ACTS OF AGENT, WHEN BINDING UPON COMPANY.—An insurance agent who, representing himself to be a general agent, solicits insurance, takes the application, receives the premium, and delivers the policy sent him by the company, binds the latter by his acts and conduct, in the absence of knowledge by the insured of a restriction on the agent's powers or of circumstances sufficient to put him on inquiry.

INSURANCE—AUTHORITY OF AGENT CANNOT BE QUESTIONED when the acts of the insurance company which he represents have been such as to amount to a recognition of his agency.

INSURANCE AGENT AUTHORIZED TO TAKE A RISK IN ONE PLACE IS PRESUMED to have authority to take them anywhere, and a risk taken by him outside his real jurisdiction is binding upon the company which he represents.

EVIDENCE—INCREASE IN INSURANCE RISK.—EXPERT EVIDENCE is not admissible to show whether or not an insurance risk is increased by changing a building used as a merchandise store, lighted by coal-oil lamps, to a variety theater, lighted by electricity.

INSURANCE—WAIVER OF PROOFS OF LOSS.—The refusal by an insurance adjuster, with the approval of his company, to settle a loss, coupled with his declaration that it will not be paid, constitutes a waiver of preliminary proofs of loss.

INSURANCE—WITHDRAWAL OF WAIVER OF PROOF OF LOSS.—Although an insurance company has waived preliminary proofs of loss, it may in good faith withdraw such waiver within a reasonable time, and require proofs to be furnished as prescribed by the policy. It thereupon becomes the duty of the insured to furnish such proofs, provided he has ample time, and no undue advantage is sought to be taken of him.

Joseph Simon, and Dolph and Mallory, for the appellant.

George H. Williams, and Wood and Linthicum, for the respondent.

577 LORD, C. J. The facts show that on the tenth day of December, 1888, the plaintiff insured with the defendant, through its agent Henry Ackerman, the above premises against loss or damage by fire, for the period of one year, and that defendant issued to the plaintiff its policy of insurance upon the same, for which he duly paid the premium therefor at the rate of ten per cent, or one hundred dollars; that on the fourth day of July, 1889, a general conflagration occurred in Ellensburg, which destroyed a large portion of the town, including the building so insured, and owned by the plaintiff; that at the time the said building was insured, and the policy issued, it was occupied for the purposes of a general merchandise store, and so continued to be occupied until some time during the month of April preceding the fire, when the character of the occupation of the building was changed from a general merchandise store to a variety theater; that a few days after the fire W. L. Chalmers, an adjuster, went to Ellensburg in the employ of several companies, including the defendant, to adjust and settle their losses, but that he refused to adjust the loss on plaintiff's building on account of the change in its occupancy. The defendant refused to pay the loss, and denied liability therefor mainly upon three grounds: 1. That Mr. Ackerman, the agent at Portland, was a special agent with limited powers, and with no authority outside of Multnomah county, state of Oregon; 2. That there had been a change in the character of the occupation of 578 the building, which increased the hazard, and avoided the policy by its express terms; 3. That there had been a failure to furnish the proofs of loss required by the terms of the policy. The conditions of the policy issued to plaintiff, relied upon to defeat the recovery, are as follows: "This entire pol-

icy shall be void if the hazard be increased by any change in the possession of the subject of insurance, etc. If fire occur, the insured shall give immediate notice of any loss thereby, in writing, to this company, and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to the company, signed and sworn to by said insured, as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof, and the amount of loss thereon; all encumbrances thereon," etc.

The testimony for the plaintiff shows that Ackerman represented himself to be the agent of the defendant, and solicited the insurance of plaintiff's property; that he negotiated the insurance of his property in the state of Washington with Ackerman, and with no other person; that he left the matter of the insurance wholly with Ackerman, and left for New York, supposing that he had full authority to act as agent for the company in the state of Washington, and without knowledge or information of any limitation on his powers; that he received the policy from Ackerman, and paid him the premium for it. Upon the part of the defendant, the record discloses that it accepted the risk, issued the policy, received the premium without objection, and treated the policy as valid until after the fire. Upon this state of the case, the plaintiff contends that the defendant by its conduct held Ackerman out as its duly accredited agent, and he was justified in assuming that he had full authority to effect the insurance. The defendant, by its testimony, sought to limit the authority of Ackerman to that of a local agent, ⁵⁷⁰ whose jurisdiction was confined to Multnomah county, and consequently claimed that he had no authority to write policies or take risks on buildings in the state of Washington, nor to speak for, or bind, the company in relation to any risk outside of his territory. Upon the issue thus presented relative to Mr. Ackerman's powers as agent in the premises, the decision rested with the jury under proper instructions from the court. As the jury found a general verdict for the plaintiff, it must be conceded that Ackerman's authority as agent is established, unless the facts and circumstances to sustain the plaintiff's side of the issue are insufficient for that purpose.

1. The acts of an agent, performed within the scope of his real or apparent authority, are binding upon his principal.

It is enough, if, under all the circumstances, he had apparent authority in the matter, although in fact his authority was limited. "Persons dealing with them in that capacity," says Mr. Wood, "are not bound to go beyond the apparent authority conferred upon them, and inquire whether they are in fact authorized to do a particular act for the company. It is enough if the act is within the scope of their apparent power, and beyond this third persons are not bound to make inquiry": 2 Wood on Insurance, sec. 408: In *Hardwick v. State Ins. Co.*, 20 Or. 547, Bean, J., says: "Where insurance companies deal with the community through a local agency, persons having transactions with the company are entitled to assume, in the absence of knowledge as to the agent's authority, that the acts and declarations of the agent are as valid as if they proceeded directly from the company." In *Phoenix Ins. Co. v. Spiers*, 87 Ky. 297, the court says: "As to third parties, the agent should, in the absence of notice to the contrary, be regarded as possessing all the powers his occupation fairly imports to the public. Under this rule, an agent who solicits the insurance, takes the application, receives the premium, and delivers the policy, may, in our opinion, ^{see} by his conduct or acts, bind his company . . . in the absence of knowledge upon the part of the assured that his powers in this respect have been restricted." The assured has the right to rely upon the agent's apparent authority, and, unless the circumstances are such as to put him upon inquiry, he is not bound to inquire as to the agent's special powers. Nor can the authority of an agent be questioned when the acts of the company have been such as to amount to a recognition of his agency: *Swan v. Liverpool etc. Ins. Co.*, 52 Miss. 704. And Mr. Wood says that "where an agent is authorized to take a risk in one place, it is presumed that he had authority to take them anywhere, and a risk taken by him outside of his real jurisdiction will be binding upon the company": Wood on Insurance, sec. 529; *Lightbody v. North American Ins. Co.*, 23 Wend. 18; *Ætna Ins. Co. v. Maguire*, 51 Ill. 342.

2. In the light of these principles of the law, assuming the testimony for the plaintiff to be true, the jury was authorized to find that Ackerman was a general agent, and empowered to effect insurance upon property located in the state of Washington. There was nothing in the circumstances, as indicated by the testimony, to excite inquiry as to the extent of his agency. He did not inform the plaintiff that his juris-

diction was confined to Multnomah county, Oregon, nor that his application must be forwarded to the general agent at San Francisco for his approval. He represented himself as the agent of the company, and solicited the insurance on the property located in the state of Washington. He assumed to act with the full authority of an unrestricted agency. By his conduct the plaintiff was led to believe that he was vested with full powers to act for the company, and bind it by his engagements, and on this account he put the whole matter of insuring his property in the agent's hands, and left for other parts of the country to which his business called him. He dealt wholly with Ackerman; he paid the premium to him, and the company received it, and issued the policy and sent it to ^{see} Ackerman, who delivered it to the plaintiff. By his acts, coupled with the acts of the company, the jury, who were to decide as to the extent of his agency, were authorized to find that Ackerman was vested with the powers of a general agent.

3. The next assignments of error relate to the competency and admissibility of certain expert testimony sought to be introduced by the defendant, which was disallowed by the court. The defendant claims that it should have been permitted to prove by the testimony of experts that the change in the character of the occupation of the building materially increased the risk, and also to prove by such testimony how the change in the occupation of the building was regarded generally by underwriters. The building insured was occupied as a general merchandise store, insured at ten per cent premium, and lighted by coal-oil lamps. Upon the change of occupancy, electric lights were substituted. Whether the change of occupancy increased the risk was a question for the consideration of the jury. The general rule is that expert testimony is not admissible as to matters of common knowledge or observation, of which the jury can judge as well as the witness. When the subject of a proposed inquiry is not a matter of science, but of common observation, upon which the ordinary mind is capable of forming a judgment, the opinion of an expert is not admissible: *Milwaukee etc. Ry. Co. v. Kellogg*, 94 U. S. 472; 1 Smith's Lead. Cas. 286.

It is competent for an insurance company to prescribe the terms and conditions upon which it will assume risks. It may decide what risks are hazardous, or extrahazardous, or what are not so, and if they are specified and named in the

policy, and prohibited, a violation of the condition avoids the policy. This policy contains no provisions inhibiting or forbidding the writing of policies on variety theaters. The plaintiff was entitled to make the change, unless it increased the risk. The question was whether the change in the occupation of the building increased ^{was} the risk. Its determination involves no question of science or skill, but simply matters of common knowledge or observation, which the jury is as competent to judge and determine as the witnesses offered as experts. It is only in reference to matters upon which the uneducated mind is incapable of forming a judgment that experts are permitted to give their conclusions. Hence, "it is not competent," as Mr. Wood says, "to inquire of a witness what the effect is upon a risk, by leaving a house unoccupied, or whether a risk has been increased by certain alterations therein, nor whether certain facts would have influenced the rate of premium, or were material to the risk. Nor is it competent to show what is generally understood among insurance men respecting the hazardous or nonhazardous character of a certain trade or business; or whether a loss resulted from negligence; or whether, if certain facts had been known to the witness, he would have taken the risk; or whether he would under a certain state of facts have consented to additional insurance; whether putting an additional number of stoves into a building would have increased the risk; whether, if certain facts had been known to the agent, he would have issued a policy, or would have communicated them to his principal": 2 Wood on Insurance, sec. 534, and cases cited. And in all cases it may be said that, unless the matters upon which the witness is called to give his opinion are properly matters of skill or science, the facts must be shown and the jury determine the result from them.

4. The next objection is to the failure of the plaintiff to furnish the proof required by the policy. The record discloses that W. L. Chalmers was an adjuster who was employed by several insurance companies, including the defendant, to adjust and settle their losses. The testimony indicates that he was a man of wide experience in such matters, and in whom confidence was reposed by the companies employing him, and that he went to Ellensburg to adjust and settle the loss sustained by the companies ^{was} he represented. Mr. Landers, the general agent of the defendant, testifies that Chalmers was employed to examine into defendant's claim, the

time being a few days after the fire, but that no instructions were given to him not to appraise or adjust plaintiff's loss.

In the discharge of his duties he obtained an estimate of the value of the loss, but when he was informed of the change in the use and occupation of the building he refused to proceed and adjust the loss. He at once wrote to the general agent of the company, informing him of the change and of his conduct in the premises, which the agent approved. Plaintiff testifies that subsequently Chalmers told him that he could not adjust the loss, because he had notice not to do so; that adjustments on other property belonging to the plaintiff were all right, but that this loss would not be paid by the company. The plaintiff also testifies that about the 1st of August he had a conversation with Ackerman, who told him that the loss would not be paid on account of the change of occupancy. Substantially upon this state of facts the plaintiff claims that Chalmers was also an agent of the defendant, and authorized to bind it within the scope of his employment, which included the authority to waive the preliminary proof of loss. Hence, the plaintiff contends, when Chalmers, and also Ackerman, stated to the plaintiff that the loss would not be paid on account of the change in the occupancy of the building, it was a denial on the part of the defendant of its liability, and operated as a waiver by it of the requirement to furnish proof of the loss.

There is some diversity of opinion as to whether an adjuster has authority to waive preliminary proof of loss; but it seems to us, as Elliott, J., said, that "the better reason is with the cases that hold that he has; for a company that sends an agent to ascertain the nature, cause, and extent of the loss, and employs him in that particular line of duty, may well be deemed to have invested him with a general authority in all such matters": *Ætna Ins. Co. v. Shryer*, 85 Ind. 363. The rule is well settled ⁵⁸⁴ and supported by numerous authorities that a denial by a defendant of liability, or a refusal to pay, is a waiver of proof of loss. "The denial by the defendant," said Shipman, J., "of all liability expressly conceded there was a loss, and was a notice to the plaintiffs that they would not be bound in any event, though formal proofs were furnished. Presentation of proofs under such circumstances was of no importance to either party; and the law rarely, if ever, requires the observance of an idle formality, especially after the party for

whose benefit the original stipulation was made has rendered conformity thereto unnecessary and practically superfluous": *Norwich etc. Transp. Co. v. Western Mass. Ins. Co.*, 84 Conn. 570. "It is well settled," said the court in *Dibrell v. Georgia Home Ins. Co.*, 110 N. C. 193, 28 Am. St. Rep. 678, "that if, instead of extending the time for filing the proofs of loss, the adjuster who is charged with examining them informs the assured, before the expiration of the sixty days, that he denies the justice of his claim, and will not pay it, such conduct, by implication, renders it unnecessary to make out a statement of loss, and is held to be a waiver of the requirement to furnish it."

5. It may be admitted within the principle announced by these adjudications that the facts to which we have alluded were sufficient to authorize the jury to find that the defendant had waived the requirement to furnish proof of the loss, and if the case stood alone upon such facts it may be conceded that it would be unnecessary to further prosecute our investigation. The record, however, discloses that subsequently, and quite a while before the time had elapsed within which the plaintiff was required to furnish a statement of his loss, the eminent counsel who then and now represents the plaintiff wrote to Mr. Landers, the general agent of the defendant at San Francisco, saying, among other things, that if "the defendant will state expressly why payment of Mr. Hahn's policy is refused, pointing out the clause or ~~ses~~ clauses in the contract upon which such refusal is based, and the reason or reasons which support it, we will suggest what seems to us the error, if any, on the part of the company." To this letter the general agent wrote in reply that he begged leave "to suggest that your client (Mr. G. W. Hahn) present to this office proof of loss claimed by him in connection with our policy No. 1,655,955, in strict accord with the printed terms thereof, and thereupon we will give the whole matter our full attention. In order to avoid technical errors in the form of proof, we inclose herewith two blanks, one of which you may retain, causing the other to be fully executed and forwarded to the undersigned."

It is clear from the letter of the general agent that the defendant either did not understand that the proof of loss had been waived, or, if it had been waived by the conduct and declarations of its agents, that the defendant intended to withdraw the conclusion of waiver inferred from such conduct

and declarations. Nor do counsel now, nor did the trial court, question the right of the defendant to withdraw such conclusion. In its charge the trial court expressly instructs the jury that "the company had the right to withdraw this conclusion if made within sixty days," but added: "if the jury believe that after the transactions aforesaid the general agent notified plaintiff or his counsel that they now required the formal proof, informing him at the same time that when these were received they would give the matter their attention, such a notice, if made in good faith, and with the intent to give the matter a fair and just examination, and allow plaintiff to enter upon negotiations regarding it, and not made to catch plaintiff by hasty admissions, then defendant should be deemed to put itself in the position of accepting proofs of loss, and the obligation devolved on plaintiff to furnish them."

We are unable to find the evidence that indicates any want of good faith, or design to entrap the plaintiff into any hasty admissions by the request that he should furnish ~~the~~ the proof of loss. Nor does it seem to us that the circumstances, viewed in any light, are susceptible of such inference. There was plenty of time before the expiration of sixty days for the plaintiff to furnish the proof of loss, and its requirement is admitted to be a prerequisite to the plaintiff's right of recovery, unless the same had been waived by the defendant. The letter of the general agent was a simple request that the proofs required by the terms of the policy should be furnished him, and that for convenience in preparing the same he had inclosed two blank proofs, one to be filled out, and the other to be retained as evidence of the fact that such proofs had been made, and it contained an assurance that upon the receipt of such proofs he would give the whole matter his full attention. What "matter" is this to which the agent refers, and to which he will give his "full attention," except the "matter" suggested by the letter of plaintiff by his counsel? That "matter" he assures the plaintiff, or his counsel, shall receive his "full attention" when the proofs of loss are furnished. Why, then, not make such proofs? There was ample time. The blanks were furnished upon which to make the statement of loss to avoid any errors. No possibility of any harm could result to the plaintiff. His interests were guarded by eminent counsel, whose ability was an assurance that their client would not be entrapped into any admissions. We do not think, therefore, there was anything in the circumstances to

justify the inference of bad faith, or calculated to throw doubt upon the good faith of the request for proof of loss, and, consequently, that it was error to submit to the jury whether such proof of loss was made in good faith or not. Except in this particular the charge is exceptionally able and clear, but for the reason suggested the case must be remanded for such further proceedings as are not inconsistent with this opinion.

INSURANCE COMPANIES—POWER OF AGENTS TO BIND—APPARENT AUTHORITY.—The agent of an insurance company, when acting within the scope of his apparent authority, will bind his company by his acts: *Union Mut. etc. Ins. Co. v. Kirchoff*, 133 Ill. 368; *Jacoway v. Insurance Co.*, 49 Ark. 320; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233; *De Gross v. Metropolitan Ins. Co.*, 61 N. Y. 594; 19 Am. Rep. 305; *Kenton Ins. Co. v. Shea*, 6 Bush, 174; 99 Am. Dec. 676, and note. The powers of agents of insurance companies, like those of agents of any other corporations or of individual principals, are to be interpreted in accordance with the general rule of agencies: *Quinlan v. Providence etc. Ins. Co.*, 133 N. Y. 356; 23 Am. St. Rep. 645, and note.

INSURANCE COMPANIES.—PRESUMPTIVE AUTHORITY OF AGENTS: See the extended notes to *Phoenix Ins. Co. v. Pickel*, 12 Am. St. Rep. 403; *Clark v. Union Mut. etc. Ins. Co.*, 77 Am. Dec. 725, and *Miller v. Mutual Ben. etc. Ins. Co.*, 7 Am. Rep. 128, where the subject is fully discussed.

INSURANCE COMPANIES—ESTOPPEL TO DENY AUTHORITY OF AGENT.—An insurance company is estopped to deny the authority of an agent, where it issues a policy on an application procured by him, and receives all dues and assessments payable to the company under the policy up to the death of the insured: *McArthur v. Home Life Assn.*, 73 Iowa, 336; 5 Am. St. Rep. 684, and note. To the same effect see *Continental Ins. Co. v. Pearce*, 39 Kan. 396; 7 Am. St. Rep. 557, and note, and *Phoenix Ins. Co. v. Meier*, 23 Neb. 124.

INSURANCE.—WAIVER OF PROOFS OF LOSS BY DENIAL OF LIABILITY: *Savage v. Phoenix Ins. Co.*, 12 Mont. 458; 33 Am. St. Rep. 591, and note; *Ree v. Dwelling House Ins. Co.*, 149 Pa. St. 94; 34 Am. St. Rep. 595, and note; *Phoenix Ins. Co. v. Bachelder*, 22 Neb. 490; 29 Am. St. Rep. 443, and note with the cases collected.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

HAMBERGER *v.* MARCUS.

[187 PENNSYLVANIA STATE, 128.]

EXEMPTIONS—WAGES.—COMMISSIONS DUE AN EMPLOYER for personal services are not liable to attachment.

EXEMPTIONS—COMMISSIONS AS WAGES—SALESMAN NOT BROKER OR FACTOR.—A traveling salesman who exhibits samples of and takes orders from purchasers for his employer's goods is not a broker or factor, although he may be compensated for his services by commissions on the sales so effected by him. Such commissions are in effect wages or salary, and as such are exempt from attachment in the hands of the employer.

EXEMPTIONS.—COMMISSIONS EARNED by factors or brokers are not exempt from attachment as wages of laborers or salaries of persons in public or private employment.

John G. Johnson, for the appellant.

Samuel M. Hyneman, for the appellee.

128 McCOLLUM, J. This is an appeal from a judgment entered against a garnishee in a suit commenced by a writ of foreign attachment. The judgment was entered on the answers of the garnishee to the interrogatories filed. It is contended by the garnishee that the debt due from him to the defendant is not liable to attachment. It appears from his answers that he employed the defendant from time to time to sell liquors, and allowed him for his services commissions on the sales; that when the attachment was served he was entitled to commissions amounting to the sum of one hundred and twenty-five dollars, and during the next seven months he earned and was paid commissions amounting to the sum of three hundred and ninety-nine dollars and seventy-eight cents.

The judgment includes the commissions earned and paid after, as well as the commissions earned and unpaid when, the attachment was served. The answers therefore present, *prima facie*, a case in which a creditor is seeking to appropriate in satisfaction of his claim the commissions due from an employer to his employee. These commissions constitute the compensation of the employee for personal services performed for his employer under an agreement between them. Are they liable to attachment? It is provided in section 5 of the act of April 15, 1845, Public Laws, 460, "that the wages of any laborer or the salary of any person in public or private employment shall not be liable to attachment in the hands of the employer." It was the obvious purpose of this act to enable laborers and persons in public or ¹³⁷ private employment to receive from their employers compensation for their personal services without hindrance from their creditors. The miner who is paid by the ton, the mechanic who is paid by the piece, and the clerk or salesman who is paid by commissions on his sales, are as much within its protection as if they were paid by the day, week, month, or year. A wholesale merchant employs two persons to travel over the country and obtain from the retail dealers orders for his goods; to one of them he pays a certain sum per month and to the other he pays commissions on the amount of orders taken.

These commissions are as clearly compensation of the employee for personal services in the interest and for the benefit of the employer as the monthly stipend is. It is a narrow construction of the statute which allows the creditors of one employee to attach in the hands of the employer the commissions which constitute his compensation for personal services and exempts from attachment in the hands of the same employer the compensation of another employee for like services. A construction which admits of such results is not warranted by a mere difference in the method of compensation. In *Wentworth's Appeal*, 3 Week. Not. 248, the question was whether the claimant was a laborer within the meaning of the act of April 9, 1872, Public Laws, 47, and this court said: "If he was a laborer it must be conceded that it does not matter in what manner his services were to be compensated, whether by daily wages or by the quantity of lumber delivered." In *Seider's Appeal*, 46 Pa. St. 57, it was decided "that, under the act of April 2, 1849, Purdon's Digest, 835, all laborers employed by the persons or companies referred

to in the act are entitled to its benefits, whether the wages agreed to be paid them are measured by time or by the ton, or by the piece or any other standard."

It is what the employer owes his employee for personal services rendered in that relation which is exempt from attachment in the hands of the employer, and it matters not whether it is called wages or salary. In *Commonwealth v. Butler*, 99 Pa. St. 535, Chief Justice Sharswood, speaking for this court, said: "The truth is, and this the lexicographers seem to hold, that if there is any difference in the popular sense between 'salary' and 'wages,' it is only in the application of them to more or less honorable services. A farmer pays his ¹²⁸ farm hands, in common speech, 'wages,' whether by the day, the week, the harvest, or the year. If for any reason he has occasion to employ an overseer, his compensation, no matter how measured, is called a 'salary.' An ironmaster pays his workmen wages; his manager receives a salary. A merchant pays wages to his servant who sweeps the floor, makes the fire, and runs his errands; but he compensates his salesman or clerk by a salary. How can it make any difference in what way the compensation is ascertained?" In *Hutchinson v. Gormley*, 48 Pa. St. 270, it was held that an attachment would not lie for the fees due a gauger of oils because it would interfere with his compensation and obstruct him in the execution of his duties. In delivering the opinion of the court, Mr. Justice Reed, after stating the grounds of the decision, said: "This makes it unnecessary to consider whether his compensation is covered by the word 'salary' in the proviso to the fifth section of the act of April 15, 1845, although it is clearly within the spirit." It is true that the cases referred to do not decide the precise question raised by the answers to the interrogatories, but they shed light upon it and are corroborative of the view that the attached commissions constitute the compensation of an employee for personal services rendered to his employer, and are within the protection of the act of April 15, 1845.

We cannot assent to the claim of the appellee that it is a necessary inference from the answers that the commissions were earned by a commission merchant or "broker." The term "broker" in its largest sense is applied to a specialist who acts as the medium of negotiating and contracting any kind of bargain. Thus there are ship brokers, insurance brokers, real estate brokers, etc. The term is, however, em-

phatically applied to persons whose business it is to negotiate and effect contracts of sales between merchants: 2 Am. & Eng. Ency. of Law, 572. In most countries a person who holds himself out to the public and engages in business as a broker must take out a license to enable him to act as such: Wharton on Agency, 458, sec. 695. In Pennsylvania, by the act of May 15, 1850, Public Laws, 773, all stock, bill, exchange, merchandise, and real estate brokers were required to pay for their respective licenses "three per cent upon the annual receipts and commissions, discounts, abatements, allowances, or other similar means in the transaction of their business."

129 A commission merchant or factor is an agent for the sale of goods in his possession or consigned to him: 3 Am. & Eng. Ency. of Law, p. 317. "He must be a specialist, that is to say, he must be a proficient in this particular business, pursuing it as a trade": Wharton on Agency, p. 448, sec. 735. He has possession of the goods he is authorized to sell, and is entitled to a lien upon them for his charges and disbursements. He receives and sells goods for others as an occupation. Being a specialist, he cannot, without his principal's consent, delegate his authority to another, but he may, and ordinarily must, employ assistants in the merely manual and clerical service pertaining to his business.

A traveling salesman who exhibits samples of and takes orders from purchasers for his employer's goods is not, in a technical or popular sense, a broker or factor, although he may be compensated for his services by commissions on the sales so effected by him. A salesman in the store of his employer may be paid for his services in like manner without becoming a commission merchant or taxable as a broker. In these cases the commissions are paid for personal services, and, as we have already seen, are fairly within the scope of the act which exempts from attachment in the hands of the employer the wages of laborers and the salaries of persons in public or private employment.

But it is claimed that the answers to the interrogatories are broad enough to include commission merchants and brokers as well as salesmen. If it be conceded that they are, and that a broker's or a factor's commissions are liable to attachment in the hands of the persons for whom he transacts business, it does not necessarily follow that the judgment against the garnishee should be sustained. In such case the proper course is to require more specific answers, or to direct an

issue for the ascertainment of the particular facts. In this way the debtor, the creditor, and the garnishee may be protected in the enjoyment of their respective rights in relation to the matter under investigation.

We do not think that a factor's or broker's commissions are exempt from attachment by virtue of the provisions of the act of April 15, 1845. These commissions do not constitute, within the meaning of that act, the wages of laborers or the salary of ~~120~~ a person in public or private employment. A factor holds himself out to the public as engaged in the business of making sales on commission, and as qualified to carry it on. His rights, powers, and duties as such are largely defined by usage, and differ materially from those of a mere clerk or salesman. He has a distinct business, and although it involves services for others, he may employ clerks and laborers to aid him in transacting it. It is a business which may be, and often is, carried on by partnerships formed for the purpose. While the proceeds of this business are usually in the form of commissions on the sales made in it, they are not wages or salary in the sense in which these words are used in the statute. For similar reasons a broker's commissions are not within its protection.

Judgment reversed, and *procedendo* awarded.

EXEMPTIONS.—An agent who sells goods by sample is not within the meaning of a statute exempting certain wages of "a laboring man or woman" from seizure: *Wildner v. Ferguson*, 42 Minn. 112; 18 Am. St. Rep. 495. See a careful review of the statutes and decisions of the several states on the exemption of wages and earnings of the debtor in the extended note to *Brown v. Hebard*, 91 Am. Dec. 411-425.

COLLINS v. LYNCH.

[187 PENNSYLVANIA STATE, 265.]

ADVERSE POSSESSION BY MARRIED WOMAN.—The presumption that the possession of a husband and wife in joint occupancy of land as a home is the possession of the husband may be rebutted by showing that she took possession in her own right under a conveyance from her father, and continued it for twenty-one years, or until the title vested in her by adverse possession. The jury must determine as to the sufficiency of such evidence to overcome the presumption arising from the joint occupancy by husband and wife.

ADVERSE POSSESSION BY MARRIED WOMAN—EFFECT OF RECOVERY IN EXEMPTION AGAINST HUSBAND.—When a married woman enters into

possession of land in her own right under a conveyance from her father, who is a mere trespasser, and continues uninterruptedly in possession, claiming the land as her own for twenty-one years, prior to a recovery in ejectment against her husband, who is in joint occupancy with herself, her title is complete, and is not affected by such recovery.

ADVERSE POSSESSION BY MARRIED WOMAN—ACTS AND DECLARATIONS BY HUSBAND AS AFFECTING.—If a married woman takes possession of land in her own right under a conveyance from her father, and continues to hold it for twenty-one years, or until title is vested in her by adverse possession, her title cannot be affected by the acts and declarations of her husband, who occupies the land jointly with her.

EJECTMENT. Judgment for plaintiff, and defendant appealed.

A. and A. Ricketts, for the appellant.

Edward A. Lynch and James L. Lenahan, for the appellee.

²⁵⁴ **WILLIAMS, J.** The plaintiff claims an undivided one-fourth part of the tract of land described in his writ, and has traced the title to the whole tract from the commonwealth down to himself, his two brothers, and his sister, the defendant, as tenants in common. ²⁵⁵ She does not attack the validity of this title, or the regularity of the conveyances, but seeks to interpose between herself and it the statute of limitations. This makes her an actor, and requires her to show by competent evidence all the ingredients necessary to make a title by possession. She must show an actual, visible possession, exclusive and hostile, and continued without interruption for twenty-one years prior to the bringing of this suit. The first step to be taken is to show when and how her possession, or the possession of those under whom she claims, began, in order to fix the point from which the computation is to be made.

Upon this subject she sought to show that her grandfather, John Shepherd, entered upon the tract and made the first improvement upon it some time prior to 1827, and on the tenth day of January of that year sold and transferred his possession to his daughter, Sallie Ann, then the wife of William Collins, by an instrument in writing. Her contention is that Sallie Ann Collins went into possession under this sale to her, and remained with her family, living upon and cultivating the land till her death in 1879. This possession, extending over half a century, she claims to have acquired by means of a sheriff's sale made in 1884 to one Morris, whose title she now holds. In this way she seeks to show a posses-

sion beginning prior to 1827, transferred by John Shepherd, her grandfather, to Sallie Ann Collins, her mother, and, by means of the sheriff's sale of her mother's title, now vested in herself. As this action was brought in 1889 and the entry and improvement are thus placed as early as 1826, she claims to have shown possession just three times as long as the statute requires. To defeat this title by possession the alleged transfer by John Shepherd to Sallie Ann Collins was attacked. A recovery in ejectment by the holders of the legal title against her husband and Truxton Benedict was shown. Declarations of her husband were admitted tending to show that he claimed some title to the land independently of her. The facts that the defendant joined her brothers in purchase of the legal title and that she took, or allowed her name to be used in taking, a lease from them for the land, were set up as a recognition by her of the legal title, sufficient to change the character of her possession and defeat her title under the statute.

To guide the jury in passing upon these questions of fact ~~see~~ the court was asked to give instructions to them upon certain legal questions submitted in writing, and it is with these instructions that we have to deal. The first assignment of error calls attention to the following instruction given by the learned judge while speaking of the transfer by John Shepherd to Sallie Ann Collins, and its effect. He said: "We instruct you that the circumstances are not sufficient to overcome the radical, legal presumption that the possession of a husband and wife in joint occupancy of premises as a home is the possession of her husband." In the absence of evidence upon the subject, the legal presumption supplies the want of evidence, but here evidence was given tending to show how the possession of the family of Mrs. Collins began and under what right or title it was taken. If the jury rejected this evidence as untrustworthy then resort could be had to the legal presumption. If they did not reject it, then they would be justified in finding that possession was entered upon under the title shown. It was a mistake therefore to take this question from the jury by a binding instruction. It is true, as the learned judge said, that it did not appear that John Shepherd had any title to the land. He might have gone further and stated that it was evident he had no title.

He had a possession, however, if the testimony on that subject was credited. This possession if undisturbed might ripen into a title under the statute of limitations. A transfer of

his possession to another who entered under it would enable the transferee to tack that possession to his own in order to complete the statutory period. It was therefore competent evidence on the subject of how Mrs. Collins and family entered upon the premises, to show that she had acquired the possession of a mere trespasser; and if she did acquire it, and enter under it, she had a right to tack the possession so acquired by her to her own. In the eighth assignment, substantially the same error is pointed out. The learned judge was asked to say that if the jury should find that Mrs. Collins entered under the transfer from her father, and continued uninterruptedly in possession claiming the lands as her own for twenty-one years prior to the recovery against her husband and Benedict, then her title was complete at that time, and would not be affected by that recovery. This the learned judge answered in the negative. Having told the jury as matter of law that she did not so enter, ²⁵⁷ but was conclusively presumed to have entered under her husband, this answer was consistent; but if, as we hold, the question under what right or authority the entry was made and possession taken, was for the jury upon all the evidence, then this answer was wrong. Again, in the ninth assignment, our attention is called to an answer that may have been made upon the same theory. The court was asked to say that if the jury should find that she took possession in her own right and continued it for twenty-one years, her title would not be affected by the acts or declarations of her husband. The reply was: "This is answered in the negative." As applicable to the facts in this case as they are alleged to be by the defendant, this was error. The point assumed a finding by the jury that Mrs. Collins had entered under the transfer from her father, and had continued for twenty-one years after her entry to hold possession. Upon these facts the court was asked to say that her title could not be talked away by her husband. The point assumed a valid title under the statute. We do not see how her husband could talk away this title any more than if his wife had acquired her title by deed from those who held under the patentee. No matter how her title accrued, when once it was vested, neither her husband nor anyone else could destroy it by his acts or words. We regret to disturb this verdict and protract this litigation, but we cannot say that the verdict might not have been different had the jury

been left to pass upon the evidence relating to the transfer from John Shepherd to his daughter, and the alleged entry under it by Mrs. Collins and her family.

The judgment must be reversed, and a *venire facias de novo* awarded.

ADVERSE POSSESSION BETWEEN HUSBAND AND WIFE.—This question is the subject of a monographic note to *Gafford v. Strauss*, 18 Am. St. Rep. 113-115, where the cases are collected and discussed. As against the husband the wife cannot acquire title to personal property during coverture, which is in their joint possession: *Harper v. Rudd*, 89 Ala. 371.

BIRD COAL AND IRON COMPANY v. HUMES.

[157 PENNSYLVANIA STATE, 278.]

CORPORATIONS—RIGHT OF STOCKHOLDER TO CONTRACT WITH LESSEE OF CORPORATION.—A stockholder in a corporation who has filed a bill to enjoin a lease of the corporate lands, may make a valid contract with the tenant of the corporation by which such stockholder upon discontinuing his suit is to receive from such tenant a bonus for each ton of coal mined by the latter. The fact that such stockholder subsequently becomes a director in the corporation does not affect his right to receive such bonus, unless the circumstances and conditions surrounding the parties become in some manner changed.

CORPORATIONS—SECRET PROFITS.—A DIRECTOR in a corporation is a trustee for the entire body of stockholders, and must manage all the business affairs of the company with a view to promote its common interest. He cannot directly or indirectly derive any personal profit or advantage by reason of his position distinct from his co-shareholders. He undertakes to give his best judgment in the interests of the corporation in all matters in which he acts for it, untrammelled by any hostile interest in himself or others. All secret profits derived by him in any dealings in regard to the corporate enterprise must be accounted for to the corporation, even though the transaction in which they are made is also of advantage to the corporation.

CORPORATIONS—SECRET PROFIT BY DIRECTOR—LIABILITY TO ACCOUNT FOR.—When a mining corporation leases its mines for a royalty of fifteen cents on each ton of coal mined, and one of its stockholders, who enters into a secret agreement with its lessee by which he receives an additional bonus of three cents on each ton mined, afterwards becomes a director in the corporation which subsequently grants the lessee a reduction of twenty per cent in the royalty by the advice of such director and without knowledge that he is receiving such additional royalty, he is entitled to receive the three cents bonus up to the time of the reduction of the royalty, but must account to the corporation for his profits made by concealing the truth at the time the reduction is given, by his advice, which is one-sixth of three cents on each ton thereafter mined.

John G. Love, J. C. Bucher, and J. H. Rockefeller, for the appellant.

C. M. Bower, John H. Orvis, and Ellis L. Orvis, for the appellee.

²⁸³ DEAN, J. The Bird Coal and Iron Company, the appellant, is a corporation; it is the owner, among other lands, of a tract in name of James Butcher, underlaid with coal, in Snowshoe township, Centre county. The capital stock of the company was 100,000 ²⁸⁴ shares of the par value of \$50.00 per share; of these E. C. Humes, appellee, owned 21,977. On the 28th of September, 1881, the company leased all the coal on this tract for five years to James Somerville, at a royalty of 15 cents per ton of 2,240 lbs.; Somerville covenanted to mine not less than 20,000 tons each year, and had an option of a further period of five years on the same terms; the first five years were to commence January 1, 1882. On October 4, 1881, Somerville advanced to Joseph Bird, for the company, \$5,000 on the royalty. With this contract the appellee had no connection, he held no official position in the company; was simply a stockholder. When he learned of the lease, he made vigorous objection, alleging the royalty and annual minimum output were too low, and so he filed a bill in equity against the company, Somerville and J. R. Peale, Esq., the attorney of the company, who was also interested, with Somerville, in the lease, averring gross inadequacy of consideration, etc., and asking that the lease be declared void, and defendants be enjoined from carrying it into effect; a preliminary injunction issued, which afterwards was dissolved. But the lessees, or those interested in the successful operation of it, procured a discontinuance of his suit by agreeing to pay him individually an additional three cents per ton on all coal mined under the lease. Somerville went on then with his mining operations, and near the close of the first five years' term ceased mining, alleging that all the marketable coal on the Butcher tract was exhausted.

On July 18, 1884, Mr. Humes became a director of the company; he accepted and served in the office. About the 1st of August following his election, Somerville and his associates requested a reduction of the royalty payable under the lease on account of competition and lower selling price in the market. Correspondence in reference to the matter was then had between Pemberton Bird, president of the company, and

Mr. Humes. Bird's letters are not before us, two of Humes' are. The first is as follows:

BELLEFONTE, PA., Aug. 9th, 1884.

Pemberton Bird, Esq., President, Northumberland, Pa.,

DEAR SIR: I have yours of the 8th, and agreeably to your request have ²⁸⁵ just had a talk with Mr. Somerville in reference to a reduction of the royalty. He states that they have lost several large customers, in consequence of their having been underbid by Boak, Orvis & Co., and other parties, and they shall probably lose more unless the price of coal is reduced at least five cents per ton to consumers. Of course, we do not wish to have the mines stand idle, and therefore I have said to him that I would suggest and advise a reduction on the royalty of three cents per ton for the present, and until notice was given to the contrary, we reserving the right to notify them, whenever, in our opinion, the condition of the market would warrant it. If this is done, I think he can induce his men to yield a trifle in order to secure full time.

Truly yours, etc.,

E. C. HUMES.

P. S. If this meets your views, perhaps you had better advise me immediately, fixing the time to commence.

The second letter, dated August 26, 1884, addressed same as first, is as follows:

DEAR SIR: In reply to yours of 25th, I have to say, that, after some reflection, I have arrived at the conclusion that, in view of the great depression and competition in coal, it possibly might be unwise for us to decline the proposition of Harned, Jacob & Co., although I do not quite like extending the time during the year 1885, still, as the projected railroads are opening up a vast area of new territory, it is probable a change for higher royalty will not occur soon, hence I would suggest that we agree to continue the reduction of three cents per ton for one year, say from September 1, 1884, on all shipments over the 20,000 stipulation in the agreement; and this strikes me as reasonably fair, if they are not bound to take out more than 20,000 tons. At the same time, they would have an inducement to exceed this quantity. I shall be satisfied with your making this proposition, and I am induced to think they will agree to it. Truly yours,

E. C. HUMES.

Between the dates of these two letters, on August the 16th,

1884, a meeting of the board of directors was had, Mr. Humes not present. The minutes show this business: "The president ²⁸⁶ stated the object of the meeting was in relation to a request of James L. Somerville and his associates in relation to abatement or drawback on royalty paid by them on coal. Whereas the competition on bituminous coal is now very great and the price of said coal is quite low, and whereas James L. Somerville and his associates have asked this company to allow them a drawback or abatement on the royalty on coal mined and shipped by them from the company's land in Centre county, in order that they may compete in the markets; therefore on motion: *Resolved*, That the Bird Coal and Iron Company give for the time being a drawback or abatement of three cents per ton on the royalty in favor of J. L. Somerville and his associates, lessees, on all coal mined and shipped from this company's mines in Centre county, provided the said lessees shall mine and ship at least seven thousand tons of coal per month. This drawback shall cease and determine at the pleasure of this company. Carried. Letter of E. C. Humes, director, received August 9, 1884, recommending the above resolution ordered filed. On motion adjourned. John H. Vincent, secretary."

Mr. Humes did not disclose the fact to any of his associate stockholders, or to any of the officers of the company at any time, that he had an individual contract, by which he was in the receipt of an extra three cents per ton on all coal mined under the lease, nor does it appear that any of them, during the existence of the lease, had knowledge of such fact. Altogether, Mr. Humes received under his special agreement eight thousand three hundred and ten dollars and eighty-three cents. It does not appear just how much of this amount was received after the reduction was made.

After the facts became known to the company, it brought an action of account render against Humes, claiming: 1. That, as a stockholder, he had no right to make a secret agreement to receive a special profit, and that the whole of the money, received by him, in equity belonged to the company; 2. That, as director, he induced the company to make an abatement of the royalty, while he was secretly in receipt of a special profit, and the fiduciary relation between him and the company demands that he account to the company for this profit received after his directorship commenced.

After the evidence had been heard for plaintiff in the court

below, a compulsory nonsuit was entered, which the court afterwards ²⁸⁷ on motion refused to take off. From that decree, this appeal is taken, appellant assigning for error the refusal of the court to take off the nonsuit.

The learned judge of the court below, in an opinion refusing to take off the nonsuit, very concisely and clearly demonstrates, from both reason and authority, that appellee is not bound to account to the company for any money received by him on his special agreement before he assumed the office of director, about the time the abatement of three cents per ton was made on the 16th of August, 1884.

But as to the second point raised by plaintiffs, he says: "But it was contended that when he became a director of the company there was such a fiduciary relation between him and the company, he would be bound to account for all money received from any dealings in regard to the corporate enterprise. But if we are correct in ruling that there can be no recovery from him for the amount received when he was a mere stockholder, we do not see how liability would attach when he became a director. There was no new contract made, and he did not so manage the affairs as a director as to receive any secret profit detrimental to the interests of the company; he merely continued to receive the amounts due according to the terms of a contract made before he became a director."

In thus failing to draw a distinction between the duty of the appellee as stockholder and director, we think there was error. There was a radical change in his relations to the company the moment he assumed the office of director. As stockholder, being the owner of his shares absolutely, he had a right to manage his own property as suited his own notions. It is one of the purposes of corporate organization of capital to facilitate the independent enjoyment and use by each member of his fractional interest in the whole. But a director is a trustee for the entire body of stockholders, and both good morals and good law imperatively demand he shall manage all the business affairs of the company with a view to promote, not his own interests, but the common interests, and he cannot directly or indirectly derive any personal profit or advantage by reason of his position, distinct from his co-shareholders: 1 Potter on Corporations, sec. 330; Morawetz on Private Corporations, 517, 518. And by assuming the office, he undertakes to give his best judgment in the

§§§ interests of the corporation in all matters in which he acts for it, untrammelled by any hostile interest in himself or others. There is an inherent obligation on his part that he will in no manner use his position to advance his own interest as an individual as distinguished from that of the corporation: *Cumberland Coal Co. v. Parish*, 42 Md. 598; *Hill v. Frazier*, 22 Pa. St. 320. And all secret profits derived by him in any dealings in regard to the corporate enterprise must be accounted for to the corporation, even though the transaction in which they were made also advantaged the corporation of which he was director: *Parker v. Nickerson*, 112 Mass. 195. It is a waste of time to cite other of the numerous authorities for these general and familiar principles, for we do not understand them to be questioned. The real contention is, whether the appellee in his conduct has brought himself within the operation of these principles.

This appeal is from a judgment of compulsory nonsuit. The evidence of plaintiff in the court below must be taken as establishing the facts testified to, or apparent from the books and documents submitted; any reasonable inference which might have been drawn from them must also be taken in appellant's favor. If defendant's side had been heard, there might have been contradictory evidence of the alleged facts; by his explanations, unfavorable inferences from the facts might have been shown to be wholly unwarranted. But in reviewing this judgment we have nothing to do with his side of the case as it might have been presented. Our duty is solely with plaintiff's side as it was presented in the most favorable aspect the evidence will warrant.

We assume, then, the existence of this individual agreement was wholly unknown to the company at the time of Mr. Hume's election as director, and afterwards, up until the demand for an accounting from him. We may remark, that the fact of it did not necessarily affect his official action. Having been made at a time when he had the undoubted legal right to make it, its existence, if circumstances remained the same, would in no respect warp his judgment or impair his devotion to the interests of the company. So, although it would have been wise to disclose it at the time he accepted the office, there was no imperative duty on him to do so.

§§§ But circumstances did not remain the same. Somerville alleged, that, owing to increasing and fierce competition in the coal business, his bargain, which had been, when made,

a fair one, had become a very hard one, and that he could not continue operations unless the company made a concession in the royalty. The president of the company, Mr. Bird, being ignorant of the special agreement with Director Humes, in all his negotiations with Somerville in regard to a reduction, acted on the assumption that fifteen cents per ton was the whole royalty then being paid. This class of contracts, although called leases, and having some of the legal incidents of leases, are generally, in fact, sales of the coal in place at a price per ton to be paid as the coal is mined. The one before us is a sale of the coal at the price or royalty of fifteen cents per ton, payable monthly. A reduction of five cents per ton was first asked by Somerville, but the company refused to concede this, and whether three cents would be allowed with an increase of the annual minimum output from 20,000 tons to 84,000, became a subject of consideration by the company. If the three cents reduction was made, it would knock off, from the price first agreed to be paid, \$2,520 on every 84,000 tons, and, as both parties seemed to estimate there remained in the tract five or six years' work, the aggregate reduction from the purchase money as fixed would have amounted to from \$15,000 to \$20,000; it was simply a reduction of twenty per cent on the purchase money for all the coal not yet mined; certainly a large concession. So far as concerned the right of the company and the obligation of Somerville, it was a wholly new contract, and resembled somewhat in its features the composition of an embarrassed debtor with his creditor for a release on payment of a part of the debt; Somerville was willing to pay, if the company would accept, and release him, eighty per cent of the real debt. In a transaction of such moment to the company, it had a legal and moral right to the best judgment of all its directors, unembarrassed by any concealed antagonistic interest. The president of the board very properly sought the advice of Director Humes, and that very fact indicated the responsibility and power of the director's office. Somerville had in effect represented to the company he could not pay fifteen cents per ton; both he and Director Humes knew this was false, for the concession of three cents, which he ^{was} willing to accept, would be a reduction from eighteen cents to fifteen. Mr. Humes then has a talk with Somerville, and writes to the president, suggesting and advising that the company make a reduction from the contract price of fifteen cents to twelve

cents, and the obvious inference from his language is, that this concession should be made because of Somerville's inability to pay fifteen cents. He gives no intimation that Somerville had actually been paying eighteen cents, three of which went into his own pocket and was to continue to go there, unaffected by the new agreement he was advising the company to make. Was this the truth? If ever there was *suppressio veri*, it seems to us, on the evidence as it stands, Director Humes was guilty of it, in not at once disclosing that Somerville was able to pay more than twelve cents, and had in fact been paying him, extra to the contract price, three cents per ton. And the inference is, that his advice induced the company to at once reduce the royalty, as they thought, from fifteen to twelve cents, while Somerville and Humes knew it was from eighteen to fifteen cents. The minutes show this in appending to the resolution this statement: "Letter of E. C. Humes, director, received August 9, 1884, recommending above resolution, ordered to be filed."

The suggestive interrogatory then is, What was the motive for this disingenuousness and disregard of a manifest official duty?

If the facts be as appellants on their unanswered testimony claim them to be, then it is not an unwarranted inference that Director Humes made for himself, by reason of his official action, a profit outside of and distinct from the other stockholders, for which he ought to account. It is argued, fairly, that he protected his three cents by getting the reduction on the company's fifteen.

It is a mistake, however, on this view of the facts, to assume, as appellants have assumed, that the whole three cents per ton belongs to the company. He had the right to receive the three cents at least up until the corporate action of the company, prompted by him, lost it twenty per cent of the contract price, while the director lost nothing. His profit by the transaction is all the company can equitably claim. What was his profit?

As the evidence stands before us, there is no legal conclusion ²⁰¹ which works a forfeiture of the whole three cents per ton.

If on satisfactory proof it had been shown that a corrupt arrangement had been made, between the director and lessee, whereby, in consideration of the former's influence in getting the price reduced to twelve cents, he was to have three, of

course the profit would have been the whole sum received. But here, the director was in the rightful receipt of three cents; appellant alleges that the understanding fairly inferable from his conduct, and the fact of no change in his three cents, was, that he retained his three cents undiminished because of his influence in securing the reduction by the company, and therefore he must pay over to the company the whole of it. This argument, however, ignores the significance of what plaintiffs failed to prove; there was no proof that the reduction of the royalty, with the increase of the minimum, was not wise as a business transaction, or that the suggestion of a reduction, in the letter of August 9, 1884, was not warranted by the changed circumstances; on the contrary, so far as appears, this was a judicious step. If that be so, he must account only for what he gained by his concealment of a material fact.

Assuming, then, that the reduction was, under the circumstances, a proper one, what reasonable inference as to the director's profit may be drawn from the evidence? There ought, says he, in substance, to be a reduction of three cents, otherwise the mines will stand idle. A reduction on what? Clearly, as he knew, on the eighteen cents then being paid. He also well knew that President Bird and the other members of the board would act on the assumption that fifteen cents was the royalty then being paid, and, if they did as he advised, would reduce the company's fifteen cents to twelve; would do this because ignorant of a material fact which it was his duty as director to disclose. If they had known he was in receipt of three cents, while that fact would not have affected the propriety of a reduction, they would have been bound, in fairness to the company, to have insisted that the three cents should be taken from the whole royalty, and not exclusively from five-sixths of it, for it was as much the interest of the man in receipt of one-sixth to have the mines running, as of those receiving five-sixths. His profit, then, by concealment of the truth, was just what he saved in the reduction, one-sixth of three cents from ²²² the time the change by his advice went into effect, and for this he ought to account. Even if, to protect his three cents from diminution, merely, he used his influence to saddle the whole reduction on the company, he did nothing which warrants the penalty of forfeiture to the company of that which it had not lost and to no part of which, before the reduction, it had any pretense of claim.

This discussion of the question is based exclusively on the facts as here presented; as they may present a very different appearance on a retrial, our conclusions then may have no value.

The judgment is reversed, *procedendo* awarded.

CORPORATIONS—DIRECTORS AS TRUSTEES.—The directors of a corporation are trustees for the corporation: *Sweeney v. Grape Sugar Co.*, 30 W. Va. 443; 8 Am. St. Rep. 88, and note; *Memphis etc. R. R. Co. v. Woods*, 38 Ala. 630; 16 Am. St. Rep. 81, and note; *Simons v. Vulcan Oil etc. Co.*, 61 Pa. St. 202; 100 Am. Dec. 628; *Hoffman Steam Coal Co. v. Cumberland Coal etc. Co.*, 16 Md. 456; 77 Am. Dec. 311, and note; *Philadelphia etc. R. R. Co. v. Cowell*, 28 Pa. St. 329; 70 Am. Dec. 128; and see the extended note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 637. In *Ten Eyck v. Pontiac etc. R. R. Co.*, 74 Mich. 228, 16 Am. St. Rep. 633, it was held that so far as the corporation was concerned its directors were mere agents, while the rule laid down in *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401, is that the directors of a solvent corporation are the trustees of it and its stockholders only so far as its creditors are concerned.

CORPORATIONS—POWER OF DIRECTORS TO DEAL WITH.—A director in a corporation cannot become a contractor with the company, nor can he have a personal and pecuniary interest in a contract between the company and a third person: *Port v. Russell*, 36 Ind. 60; 10 Am. Rep. 5, and note. See the extended notes to *Beach v. Miller*, 17 Am. St. Rep. 298-308; *Garrett v. Burlington Plow Co.*, 59 Am. Rep. 466, and the notes to *Chicago etc. Cab Co. v. Yerkes*, 33 Am. St. Rep. 325, and *Mullanphy Sav. Bank v. Schott*, 25 Am. St. Rep. 410, where the question will be found fully discussed.

HAGUE v. WHEELER.

[187 PENNSYLVANIA STATE, 324.]

NATURAL GAS—RIGHT OF OWNER TO DRAIN GAS-WELL.—When a land-owner drills a gas-well on his own land without malice or negligence, and in a lawful manner and for a lawful purpose, he cannot be restrained by injunction from draining his well, and permitting the gas to escape therefrom and go to waste, when the only injury resulting to adjoining landholders and gas-well owners is a depletion in the supply of gas in the same basin, or gas-bearing sand-rock in which the lands of all of the parties are situated.

BILL for an injunction to restrain the waste of gas on adjoining lands. The injunction was granted, and the defendants appealed.

D. I. Ball, C. C. Thompson, W. M. Lindsey, and J. O. Furness, for the appellants.

Roger Sherman, W. W. Wilbur, and Samuel Grumbine, for the appellees.

236 WILLIAMS, J. The learned judge of the court below was quite right in saying that the questions raised in this case "are of great importance and delicacy, and have never been determined in any court." The production of oil and gas in this state has furnished many questions "of great importance and delicacy" that were new, and required to be considered and determined upon facts that were never dreamed of by the sages of the common law.

In the treatment of this case it is a matter of first importance to get a clear apprehension of the facts on which the questions are raised. There are two plaintiffs who join in the bill whose interests, while like in kind, are nevertheless several and distinct. There are several defendants, but their interests appear to be joint. The two plaintiffs hold separate leases on parts of tracts in Warren and Forest counties, Nos. 5202, 5203, 237 5207, and 5209, aggregating about 2,200 acres. The gas company began drilling on its leases in 1887. Hague began in 1888. Each has a gas well or wells furnishing gas in sufficient volume to enable the owner to utilize it by transportation to and sale in towns in the vicinity. The defendants are owners and lessees of part of tract No. 5207, which adjoins the lands of the gas company, and is not far from the lands of Hague. In 1890 they drilled a well on their tract, and obtained gas in considerable volume, but not sufficient to enable them to utilize it by transportation and sale. They have therefore allowed it to escape into the open air. The plaintiffs allege that the "geological formation in that locality" is such that the gas-bearing sand-rock underlying all these tracts, and forming the common reservoir or deposit from which the gas is obtained, "is subject to drainage by the drilling of wells on any part thereof." For this reason they assert that "the flow of gas from the said well of defendants is so great that it will, if allowed to go to waste, seriously and irreparably injure the wells of the plaintiffs by drainage from the lands adjoining and near to said defendants' wells."

To prevent this they state that they entered on the defendants' land, and at a cost of about two hundred dollars shut in the gas and closed the well. The defendants then threatened to remove the cap or plug and permit the gas to escape again into the air. Upon these facts the plaintiffs asked the court below to enjoin the defendants from removing the cap or plug from the casing or tubing in the well, and from "permitting

the gas therefrom to flow into the air or otherwise go to waste." The injunction was granted, and from that decree this appeal was taken.

The affidavits show that the defendants drilled their well in 1890 at the suggestion and request of the gas company, and that negotiations for its purchase by the gas company have been conducted at some length, but without resulting in a bargain. This fact, that the well in controversy had been drilled at considerable cost by the defendants at the request of the gas company, the learned judge rightly regarded as a significant one. In the opinion filed by him, which is an able one, he says that this fact "might defeat this application so far as the gas company is concerned"; but he regarded it as of no consequence ³³⁸ so far as the other plaintiff was concerned, for he immediately added "but as it cannot affect the plaintiff Hague, it is not necessary to consider it at this time." He then proceeds to state and consider the question on which his decree was based, upon a state of facts such as might arise where an adjoining owner was guilty of malice or negligence in the conduct of operations on his land resulting naturally in injury to his neighbor. But is this conclusion of the learned judge that Hague stood on higher ground than the gas company a correct one? The acts complained of were the drilling of the well in 1890, when the wells of both the plaintiffs were in full operation, and the subsequent failure to utilize or shut in the gas. The drilling of the well was accounted for, and the suggestion of malice or negligence therein negatived by proof that it was done at the instance of the gas company.

This company had a considerable gas plant, and was engaged in the supply of gas to its customers for fuel. It was interested in the development of the region, and evidently expected to buy the defendants' well if it was of sufficient size to be capable of utilization. The defendants and the gas company could not agree upon the price of the well after it was drilled; but the fact that it was drilled at the request of the company, and not of the mere motion of the defendants, was an answer to any allegation of malice or negligence on the part of Hague as well as on the part of the company, since it accounted for the act of drilling by assigning a motive therefor both lawful and neighborly. It will not do to say that an act, thus accounted for as to one plaintiff, may be assumed to be the result of malice or negligence as to the

other, in the absence of proof to sustain the assertion. These plaintiffs stand on common ground. Neither of them can complain of the defendants for the act of drilling the well on their land on any other ground than the existence of malice or negligence, and when the act is accounted for in such a manner as to show that it was not done with malice or in negligence, but in good faith, as an act of ownership and at the solicitation of the gas company, the character of the act is established, and as a basis of relief it falls out of the case. What have we then? Three landowners owning considerable holdings in the same basin or overlying the same gas-bearing sand-rock, each having an open gas well or wells on his land, ~~and~~ drilled without malice or negligence, in a lawful manner and for a lawful purpose. Two of these owners have been able to utilize the gas from their respective lands and find a market for it.

One of them has not been so fortunate. He has gas from his well, but, up to the time of the filing of this bill, he has not been able to utilize or dispose of it, and his gas has gone to waste for that reason. His more fortunate neighbors come into a court of equity and ask that he shall not be permitted to let his gas run, because, while this gas is his own, underlying his tract, and finding its way to the surface through his well, it has a tendency to drain the sand-rock and so to reduce ultimately the flow of gas from their wells. This would be equally true if the defendants were able to utilize their gas; yet it is conceded that in that case their right to the gas from their well would be as incontestable as the right of the plaintiffs to use the gas from theirs. How is that right lost? By their inability to find a purchaser? If they can find a purchaser, or turn the gas to any useful purpose, their right to the gas that flows from their well is conceded. If they cannot, their right is denied. Their well must be shut in, while their successful neighbors drain the entire basin, through their open wells, and receive pay for the gas. This is a proposition to limit the power of the owner over his own by the use he is able to make of it. If he can sell his gas or his oil, or turn it to some practical purpose, his power over it as owner is unabridged. If he cannot find a purchaser, or a practical purpose to which to apply his yield of gas or oil, then his power as owner is gone. This would be an adaptation to actual business of the spiritual truth that "to him that hath

shall be given, but from him that hath not shall be taken away even that which he seemeth to have."

Does the maxim, *sic utere tuo ut alienum non lædas*, require us to grant the relief sought in this case? If, in burning the gas from their well, the defendants should direct the jet towards the plaintiff's buildings or timber, or should leave it uncontrolled so that the wind might drive it against or towards the plaintiffs' property so as to injure or endanger it, a case would be presented in which the maxim would be applicable and we should take pleasure in enforcing it. If the defendants' well produced nothing, and they were leaving it without plugging, ³⁴⁰ so that the water might find its way into the sand-rock to the injury of others, we could punish them under the statute which prescribes the manner of plugging an unproductive well, and makes it obligatory on the owner to adopt it. But we have a well drilled for a lawful purpose, in a lawful manner, and actually producing gas which is not directed towards the property of another, or so consumed as to affect the buildings, timber, or crops of any adjoining owner. It is, therefore, not the use of the gas of which the plaintiffs complain. It is the production of it, when the owner cannot sell it or turn it to any practical purpose.

Now it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject. Something has been done in this direction already by the acts regulating the plugging of abandoned wells; but it is not the public interest that is involved in this litigation. It is the interest of an adjoining owner who seeks to appropriate to himself so much of his neighbor's gas as he cannot turn into money, or use for some practical business purpose, and he asks a court of equity to hold his neighbor's hands by an injunction until this appropriation is accomplished. We cannot find any rule of law, or any principle of equity, on which such an injunction can rest. The scope of the Golden Rule may be sufficiently ample to cover this case; and it may be that it would require an owner to surrender to his neighbor so much of his own property as he could not turn to his own advantage, if his neighbor was so situated that he could profit by it. Assuming this to be so, the moral obligation so arising is not enforceable by civil process. The owner of timber may pile it in heaps and burn it, as was done in the early settlement of the country,

notwithstanding the fact that his neighbor has a sawmill and all the facilities for preparing the sawed lumber for market and converting it into money. The power of the owner of the timber over it is neither greater nor less because of his neighbor's readiness and ability to market it. An owner of land may have a deposit of coal under some portion of it so small in extent, or with such an inclination, as to make it impossible for him to mine through his own tract without a greater cost to him than the value of the mined coal when brought to the surface. His neighbor may have an open mine that reaches ³⁴¹ it, and through which it could be brought at a fair profit.

These circumstances do not affect the title of the owner of the coal, or confer any right on the adjoining mine-owner. But it is said that the oil and gas are unlike the solid minerals, since they may move through the interstitial spaces or crevices, in the sand-rocks, in search of an opening through which they may escape from the pressure to which they are subject. This is probably true. It is one of the contingencies to which this species of property is subject. But the owner of the surface is an owner downward to the center, until the underlying strata have been severed from the surface by sale. What is found within the boundaries of his tract belongs to him according to its nature. The air and the water he may use. The coal and iron or other solid mineral he may mine and carry away. The oil and gas he may bring to the surface and sell in like manner to be carried away and consumed. His dominion is, upon general principles, as absolute over the fluid as the solid minerals. It is exercised in the same manner, and with the same results. He cannot estimate the quantity in place of gas or oil as he might of the solid minerals. He cannot prevent its movement away from him, towards an outlet on some other person's land, which may be more or less rapid, depending on the dip of the rock, or the coarseness of the sand composing it; but so long as he can reach it and bring it to the surface, it is his absolutely, to sell, to use, to give away, or to squander, as in the case of his other property. In the disposition he may make of it he is subject to two limitations. He must not disregard his obligations to the public. He must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy or any positive provision of the written law, he brings himself within the reach of the courts. If the use he makes

of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but, subject to these limitations, his power as an owner is absolute until the legislature shall, in the interest of the public as consumers, restrict and regulate it by statute.

The decree of the court below is reversed and the injunction is dissolved.

NATURAL GAS.—A landowner has the right to increase the flow of natural gas by "shooting" a well on his premises, though by so doing he will draw off and diminish the supply of natural gas in the lands of another: *People's Gas Co. v. Tyner*, 131 Ind. 277; 31 Am. St. Rep. 433, and note.

DAMAGES—LIABILITY TO ADJOINING LANDOWNER FOR DAMAGES FROM LAWFUL ACT DONE ON ONE'S OWN PREMISES.—This question is discussed in *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267; *ante*, 552, and note with the cases collected.

ELDER v. LYKENS VALLEY COAL COMPANY.

[157 PENNSYLVANIA STATE, 490.]

MINING DEBRIS—LIABILITY FOR INJURY CAUSED BY.—The owner of coal lands may mine and remove his coal in a proper manner, and, if the drainage from his mines falls into and pollutes a stream of water and injuriously affects lower riparian owners, this fact alone will not impose liability on the owner of the coal.

MINING DEBRIS—DUTY OF MINE-OWNER TO CARE FOR.—A mine-owner must deposit the refuse matter from his mines on his own land where it will be safe from encroachment by ordinary floods, and if an extraordinary flood should reach and carry away any portion of the refuse so deposited, and leave it on the lands of lower proprietors, the mine-owner is not liable for the injury so sustained.

MINING DEBRIS—DUTY OF MINE-OWNER TO CARE FOR—LIABILITY FOR NEGLIGENCE.—A mine-owner has no right to throw the refuse matter from his mine into a stream or to leave it on his own land where ordinary floods will carry it down upon the land of a lower proprietor, and if he does so the injury suffered therefrom is not the natural and necessary consequence of rightful mining but of a want of proper care in disposing of such debris, and for such injury an action will lie.

MINING DEBRIS—MEASURE OF DAMAGES.—In an action by a lower riparian proprietor to recover for injury received by the deposit of mining refuse upon his land and caused by the negligence of an upper proprietor and mine-owner, the measure of damages is the cost of removing the debris, or if that is impracticable then the difference in the rental value of the land caused by the descent of the refuse matter upon it.

MINING DEBRIS—LIABILITY FOR NEGLIGENCE IN DUMPING INTO STREAM.—If a mine-owner throws the refuse matter from his mine into a stream where every flood as well as the ordinary current will act upon it and

carry it gradually down the stream he is guilty of negligence, and the fact that an extraordinary flood accelerates its descent and gives the final impulse that lodges it on the land of a lower owner will not relieve the mine-owner from liability for the injury thus inflicted.

MINING DEBRIS—NEGLIGENCE IN DISPOSING OF—OPINION EVIDENCE—QUESTION FOR JURY.—Whether or not a given act is performed in a prudent and proper manner is a subject upon which a witness qualified to speak may express an opinion. But whether or not a given line of conduct, like the management of the refuse matter from a mine, is negligent or careful, is for the jurymen to determine from all the facts before them.

MINING DEBRIS—LIABILITY FOR NEGLIGENCE IN DISPOSING OF—EXPERT EVIDENCE WHEN IRRELEVANT.—In an action to recover for injuries received from a deposit of mining debris upon the land of a lower proprietor caused by the negligence of a mine-owner, evidence of an engineer that certain retaining walls were built in a proper manner is irrelevant, when it appears that the injury was inflicted by negligently throwing the debris into a stream.

TRESPASS for injury, to land caused by a deposit of mining debris thereon. Judgment for plaintiff, and defendant appealed.

L. W. Hall and Francis Jordan, for the appellant.

Lyman D. Gilbert, John H. Weiss, and John E. Fox, for the appellee.

406 **WILLIAMS, J.** The legal questions involved in this case are well settled. The trouble is with the questions of fact. There is no doubt that the owner of coal lands may mine and remove his coal in a proper manner. If the drainage from the mines falls into 407 and pollutes a stream of water and injuriously affects lower riparian owners, this fact alone will not impose liability on the owner of the coal: *Pennsylvania Coal Co. v. Sanderson*, 118 Pa. St. 126; 57 Am. Rep. 445. He may deposit the culm and refuse from his mines on his own land where they will be safe from encroachment by ordinary floods. If an extraordinary flood should reach and carry away any portions of the culm so deposited, and leave it on the lands of lower riparian owners, he is not liable for the injury so sustained. But he must deposit the culm and refuse on his own lands. He has no right to throw it into the streams, or leave it where ordinary floods will carry it down upon the lands of others: *Lents v. Carnegie*, 145 Pa. St. 612; 27 Am. St. Rep. 717.

If he does throw it into the stream, or leave it where ordinary floods will carry it away, then the injury that his neighbor may suffer therefrom is not the natural and necessary

consequence of the rightful mining of coal, but of the want of proper care in disposing of the refuse product of the mines. For an injury resulting from the want of care an action will lie. It may be convenient or economical for the coal-owner to throw the refuse of his mines into the stream; but that is not enough. He is bound to consider the rights of others. If he takes the risk of injuring others to save trouble or expense for himself, he makes himself liable for the loss his conduct may inflict on his neighbors. These general rules are settled by a multitude of cases.

The controversy in this case was mainly over the facts. The plaintiff alleged that the defendant company used the stream called Bear creek to carry away large quantities of its refuse, and that this was brought by the water down upon his lands, thereby injuring them, and greatly impairing their value. The defendant denied such use of the stream, asserted that so much of the refuse as was thrown into it was thus disposed of in order to make room for a retaining wall to protect the culm-pile from ordinary floods, and that the deposit of refuse on the plaintiff's land was the work of an extraordinary flood, for which the defendant could not be held responsible. These were questions for the jury, and the evidence relating to them was of such a character that we do not see how it could have been withdrawn from the jury. The verdict must be taken as establishing the facts that the defendant did put large quantities of refuse into the stream, and that it descended upon the lands of the plaintiff, ⁴⁹⁸ and lodged there. Upon these facts the plaintiff was entitled to recover his actual loss.

The motive with which an unlawful act is performed is ordinarily immaterial, except as it may bear upon the question of the plaintiff's right to exemplary damages. The learned judge of the court below did not, as we understand him, submit the question of the plaintiff's right to exemplary damages to the jury, but instructed them that the measure of the plaintiff's loss, and consequently of his damages, was the difference in the rental value of his land caused by the descent of the refuse upon it. This was the correct measure of the actual damage suffered from the defendant's act, regardless of the motive which inspired it, unless the culm could be removed, and the land restored to its original condition, for a less sum; and this was not alleged.

It was also contended upon the trial that if it be conceded

that refuse was thrown into the stream, and carried by it part of the way to the plaintiff's land, yet, as the evidence shows that it was washed upon the land, or made its actual descent from its last resting-place under the influence of an extraordinary flood, the plaintiff's loss is chargeable to an extraordinary flood, and not the defendant's act. It is undoubtedly true that no liability arises from the loss occasioned by an extraordinary flood. Such flood is treated as the act of God, for which no action lies. If, therefore, the evidence in this case had shown the exercise of proper care on the part of the defendant to protect the culm from the action of the water, and that an extraordinary flood, overcoming the precautions employed, had swept it away, the rule invoked would be applicable. If, on the other hand, the evidence satisfied the jury that the defendant had thrown the culm into the stream where every flood, as well as the ordinary current, would act upon it, and carry it gradually down the stream, the fact that an extraordinary flood quickened its descent, and gave the final impulse that lodged it on the plaintiff's land, is not enough to bring the case within the rule. Upon the latter state of facts the extraordinary flood is not an unlooked-for and overpowering force invading the defendant's grounds, and sweeping away that which an ordinary flood would not reach, but a force co-operating with the negligence of the defendant. It would, upon such a state of facts, add its energy ⁴⁰⁰ to the defendant's neglect, and so expedite the natural process of descent which began with the defendant's unlawful act of throwing the refuse into the stream.

Several assignments of error are to the rejection of evidence offered to disprove negligence. This was a competent line of evidence if the offers were of matter that was competent. Whether a given act is performed in a prudent and proper manner is a subject upon which a witness qualified to speak may express an opinion. He may state the manner of the performance, and whether the precautions taken or the work done were reasonably sufficient for the purpose in view. But whether a line of conduct, like the defendant's management of its culm-pile, is negligent or careful is for the jury, after the facts are laid before them. We think, also, that so far as the offers related to particular facts, the court below was right in holding the facts irrelevant. Thus Womelsdorf was called as an engineer, and an offer was made to show by him as an

expert witness that "in putting up these walls, and doing the work that we did, we did what we should have done; I mean to say that we did it in a skillful and workmanlike manner, well calculated to produce the desired effect." The objection to the relevancy of this offer rested on the fact that no complaint was made about the manner in which the walls were constructed. The walls were not in the controversy. The complaint was that culm and refuse had been thrown in the stream by the defendant in large quantities, and the character of the walls threw no light upon that subject. The same objection exists to the offer to show that "the unprecedented flood of 1886 did great damage to the defendant's property, and caused the mines to be idle for three weeks." This tended neither to deny nor excuse the acts charged against the defendant, and was rightly held to be irrelevant matter. The recovery seems to us to be large, but the learned judge of the court below could not have been of this opinion, or he would have set aside or reduced the verdict.

The assignments of error are not sustained, and the judgment is affirmed.

MINING DEBRIS—LIABILITY FOR INJURY CAUSED BY.—If a coal-mining corporation so places the slack and refuse from its mine that they wash down a creek and cause it to overflow and inundate the land of a lower owner, and cover parts of it with debris, the company is liable for any injury caused him: *Columbus etc. Iron Co. v. Tucker*, 48 Ohio St. 41, 29 Am. St. Rep. 528, and note. A manufacturer of coke from coal not mined on his own land is liable in actual damages to a lower proprietor for the pollution of a stream as a necessary incident to his business: *Lents v. Carnegie*, 145 Pa. St. 612; 27 Am. St. Rep. 717, and note; *Robb v. Carnegie*, 145 Pa. St. 324; 27 Am. St. Rep. 694, and note. See, also, the note to *Helfrich v. Catonsville Water Co.*, 28 Am. St. Rep. 249. The debris question is the subject of the monographic note to *Mississippi Mills Co. v. Smith*, 30 Am. St. Rep. 551-557.

COMMONWEALTH v. EDISON ELECTRIC LIGHT CO.

[157 PENNSYLVANIA STATE, 529.]

PATENT RIGHTS—TAXATION OF.—The capital stock of a corporation issued for, or invested in, patents or patent rights is not subject to taxation under state laws.

APPEAL from a tax settlement. Judgment for defendant, and the plaintiff appealed.

James A. Stranahan, deputy attorney general, and W. U. Hensel, attorney general, for the appellant.

M. E. Olmsted and Samuel B. Husy, for the appellee.

530 GREEN, J. The fourth finding of fact by the learned court below, which is fully sustained by the testimony, declares that thirty-five thousand dollars in cash and three thousand shares of stock were issued and paid by the defendant company to the Edison Electric Light Company of New York for certain rights under its patents within the city of Philadelphia, and that without these rights the defendant could not carry on its business and furnish electric light to its customers. Also that "in consideration for said cash and stock paid to the Electric Light Company of New York, the defendant did not receive any tangible property whatever, but merely certain intangible rights or licenses under said letters patent." Also that "the defendant does not lease from any persons from whom said licenses were obtained any tangible property whatever, nor does it have in its possession any tangible property belonging to said persons."

This state of facts brings the case within the principle that capital stock invested in patents or patent rights is not taxable under state laws, as established by our decisions in the cases of *Commonwealth v. Westinghouse Electric Co.*, 151 Pa. St. 265; *Commonwealth v. Westinghouse Air Brake Co.*, 151 Pa. St. 276; and *Commonwealth v. Philadelphia Co.*, 157 Pa. St. 527, in which the opinion has just been filed.

We are therefore of opinion that the learned court below was right in its ruling.

Judgment affirmed.

TAXATION OF PATENT RIGHTS, AND PATENTED ARTICLES.—As is shown by the principal case, the rule is well established in Pennsylvania that the capital stock of a corporation invested in patents, or patent rights, or capital stock issued for patent rights merely, and not for tangible property, or goods manufactured under such rights, is not taxable by the state. The

reason for the rule is that such taxation would involve a property right which depends for its existence exclusively upon the federal constitution and acts of Congress. The question was first brought directly to the attention of the supreme court of that state in the case of *Commonwealth v. Westinghouse Electric etc. Co.*, 151 Pa. St. 235, in which it was decided in the lower court that any portion of the capital stock of a corporation invested in either an assignment or a grant of a patent right could not be taxed by the state. This point was affirmed on appeal without any further attention to the subject than to say that "part of its capital stock is invested in patent rights, and that it is not taxable upon that part is so clearly and forcibly shown by the learned court below as to render further discussion of that subject undesirable." In delivering the opinion of the lower court referred to, McPherson, J., said: "We also hold that so much of its capital stock as is invested in patent rights granted by the United States is not taxable by the state. As we understand the evidence, these patent rights were either originally issued, or have been directly assigned, to the defendant; and it therefore stands in the same position as an original patentee. The case presents a question of great importance, which has not been decided by any court of last resort, so far as we are aware, and which deserves, and has received, our careful consideration. The property in every patented invention has two elements: 1. The right to practice the invention; and 2. The monopoly of sale, use, and manufacture in favor of the inventor. Each of these elements is property. Each may be dealt with as property by the owner, and to some extent may be dealt with separately if he chooses. This right may be transferred by three different forms of conveyance, namely, assignment, grant, or license, each having a well-defined technical meaning, and each operating only upon its appropriate subject matter. Neither has any necessary connection with the tangible patented article, and with this we have no present concern; the subject now involved is the right in its twofold aspect. An assignment then operates upon both elements above referred to, upon the invention, and also upon the monopoly, and cannot transfer either separately. It must convey the entire interest of the patentee, or an undivided part thereof, and must embrace the whole United States. A grant differs from an assignment only in the fact that the area within which it operates is confined, and must be less than the whole United States. In these two forms of transfer it is plain that the specially valuable element of the patent, namely, the monopoly, the right to exclude others from making, using, or selling the patented article or process, is directly conveyed by the patentee, and passes completely to the assignee or grantee, who may thereafter protect his rights by suit in his own name. It is plain also that this right to exclude rests upon the federal constitution and the acts of Congress. Whenever, therefore, it appears that the capital stock of a Pennsylvania corporation has been invested in either an assignment or a grant of a patent right, in our opinion, the state must be forbidden to tax such stock.

The learned judge then pointed out the difference between a grant or assignment of a patent right, and a license to manufacture and sell thereunder; and after citing *California v. Central Pac. R. R. Co.*, 127 U. S. 1, to show that franchises granted by Congress cannot be taxed by a state, he proceeded to say that "While a patent right may not be a franchise in the strict sense of that word, it certainly resembles it in being a privilege which concerns, and is intended to benefit, the public, and which depends for existence and preservation upon the government which confers it. Such a right granted by Congress would be exposed to serious danger if every state could

tax it at will, either directly or by means of a tax upon capital stock. In Pennsylvania it could be reached without difficulty by exercising a legislative power to classify subjects of taxation. Suppose a taxing statute to put together in one class all corporations whose capital stock was invested either in whole or in part in patents granted by the United States, and to tax them at a different rate from all other corporations. If this would be constitutional, the class first named might be destroyed. In conclusion we desire to say that it has not been necessary to consider or determine the power of the state to tax tangible articles manufactured under a patent right, or to restrict the sale, or to regulate the use, of such articles in the exercise of the police power: *Patterson v. Kentucky*, 97 U. S. 501. The point decided is that the state may not tax capital stock invested in any form of the intangible right."

The subsequent Pennsylvania cases involving this question have been decided upon the authority of *Commonwealth v. Westinghouse Electric Co.*, 151 Pa. St. 265, just quoted from, without any further examination or consideration of the principles involved: *Commonwealth v. Westinghouse Air Brake Co.*, 151 Pa. St. 276; *Commonwealth v. Philadelphia Co.*, 157 Pa. St. 527; *Commonwealth v. Edison etc. Co.*, 157 Pa. 529. The only other case found bearing directly upon the question is that of *People v. Campbell*, 138 N. Y. 643. It maintains a doctrine directly contrary to the cases above cited. The New York case was a proceeding by *certiorari* to review the action of the state controller in imposing a tax upon the relator, the Edison Electric Light Company, a domestic corporation, under the Corporation Tax Act. The entire capital stock of the relator was originally invested in patent rights. Corporations were formed in New York and other states, to whom the relator granted the right to use these patents, receiving in compensation stock in such corporations. It was decided that as to so much of such stock as was in corporations organized in New York, it was the capital of the relator employed in that state, and as such was a basis of taxation, but that the stock in corporations of other states was capital employed outside the state, and not taxable. It was also claimed in that case that the relator held bonds of foreign corporations, issued to it in payment for patent rights granted, and on this question it was determined that so much of relator's capital as was invested in these bonds was a basis of taxation under the statute. In delivering the opinion of the court Earl, J., said: "It is sufficiently accurate for the purpose now in hand to say that the entire capital of the relator was originally invested in patent rights. Corporations were formed in various cities of this state, and to a large extent in cities outside of the state, to use these patents, and to those corporations the relator granted the right to use the patents, and in compensation for such grants it received stock of such corporations, and during the year 1891 it held such stocks, and received the dividends declared thereon. As to so much of said stocks as was in corporations organized in this state, it cannot be doubted that its capital was employed in this state. So much of its capital, to wit, its patents, as was used to purchase such stocks was employed for that purpose, and was thus used for the business of the relator. The stocks existed within this state, and were kept and held to produce revenue here, and hence in every sense were employed within this state. They took the place, as a portion of the relator's capital, of the patent rights transferred in payment for them. The stocks which the relator took in companies organized outside of this state stood for so much of the relator's capital invested outside of the state. It took a portion of its capital, to wit, a portion of its patent rights, and em-

played it outside the state to purchase those stocks. Its property in those corporations, represented by its shares of stock, was outside of this state, and was in no sense employed here. Those stocks had no *situs* here, and were not taxable here under any system of taxation which ever existed in this state. To make such capital a basis for taxation it must have been employed within this state." . . . "It is said in this record, although not distinctly shown, that the relator also held bonds of foreign corporations, issued to it in payment for patent rights granted. We think that so much of the capital as was invested in such bonds was a basis of taxation here under the act. Those bonds were presumably held at its office in this state, and such bonds, as well as all choses in action, unless kept, employed, or used outside of the state, have their *situs* at the domicile of the owner. The bonds took the place of the patent rights granted for their purchase. They were kept and held here to earn revenue for the relator, and they were, in a proper sense, employed here for that purpose": *People v. Campbell*, 138 N. Y. 543, 545-547.

Taxation of Patented Articles.—The rights conferred by the patent laws of the United States to inventors to sell their inventions and discoveries does not take the tangible property in which the invention or discovery may be exhibited or carried into effect from the operation of the tax or license laws of the state: *Webber v. Virginia*, 103 U. S. 344; *Patterson v. Kentucky*, 97 U. S. 501. On the same principle capital stock issued by a corporation in consideration of a license granting to it the exclusive right to use and sell patented appliances within certain territory, the appliances for such use and sale to be furnished to it by the licensor at regular prices is not an investment in patent rights exempt from taxation by the state: *Commonwealth v. Central etc. Tel. Co.*, 145 Pa. St. 121; 27 Am. St. Rep. 677; *Commonwealth v. Edison Electric Light Co.*, 145 Pa. St. 131; 27 Am. St. Rep. 683; *Commonwealth v. Philadelphia Co.*, 145 Pa. St. 142; *Commonwealth v. Brush Electric Light Co.*, 145 Pa. St. 147. In *Commonwealth Central etc. Tel. Co.*, 145 Pa. St. 121, 27 Am. St. Rep. 677, it appeared that in consideration of a part of the capital stock of a telephone corporation, the owner of patents for telephones agreed with the corporation that it should have the exclusive right for a term of years to use such telephones within certain territory, the instruments so used to be furnished by, and to remain the property of, the patentee, the corporation paying a certain rental for their use, and it was held, that as the contract did not transfer to the telephone corporation the ownership of any interest in the patent, but simply the right to use as lessee the instruments manufactured thereunder, the stock paid under the contract was not an investment in patent rights, and not exempt, under the laws of the United States, from taxation by the state. In the subsequent case of *Commonwealth v. Edison Electric Light Co.*, 145 Pa. St. 131, 27 Am. St. Rep. 683, involving the same question the court said: "Whether the tangible property, that is, the machines or appliances made and ready for use, is, in the hands of the makers, of vendors, lessees, or licensees can make no difference. Such property is not a patent right, but the visible tangible fruit of the right secured by the patent which passes to a purchaser or lessee in precisely the same way that any other manufactured articles pass from the maker to the buyer or lessee," and capital stock issued by a corporation in consideration of the exclusive right to use such patented appliances, is not an investment in patent rights, and is taxable by the state. In the subsequent case of *Commonwealth v. Philadelphia Co.*, 145 Pa. St. 142, the court said: "The question raised on these facts is whether

the stock used, instead of money, to pay for the right to use by themselves, their lessees, or vendees, the manufactured apparatus made under protection of the enumerated patents, in the county of Allegheny was invested in patent rights, and therefore exempt from the capital stock tax imposed by the commonwealth. It will be seen, by reference to the contract and findings of the court below, that the subject matter of the sale or license by Westinghouse was not his patents, but his machines or apparatus, manufactured and ready for the trade. He did not sell his right as an inventor, but his goods as a manufacturer and owner, finished and ready for use. True he agreed to sell to no one else in the county, and to allow the company to control the sale; within the county lines, just as a manufacturer of a particular brand of cloth or leather might agree to do with a customer in the same county who wished to control the trade therein; but this was an agreement and nothing more." It was not an investment in patent rights, but in the tangible property or fruits of such rights, and as such the capital stock thus invested is subject to taxation by the state.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

STATE v. BREWER.

[38 SOUTH CAROLINA, 232.]

CRIMINAL LAW—PUNISHMENT OF ONE CONVICTED OF BASTARDY.—Under the statutes of South Carolina, one who has been convicted of bastardy, and fails or refuses to enter into the necessary recognizance for the support of his bastard child, may, after execution against his property has been returned wholly or partially unsatisfied, be arrested under a writ of *capias ad satisfaciendum* and committed to jail, subject, however, to the privileges accorded to insolvent debtors arrested under a similar writ.

CONSTITUTIONAL LAW—IMPRISONMENT FOR NONPAYMENT OF PENALTY.—A constitutional inhibition against imprisonment for debt is not violated by the imprisonment of one who, after his conviction on a charge of bastardy, has failed to pay the penalty imposed by virtue of the provisions of a statute, regulating prosecutions for that offense and expressly enabling persons so imprisoned to avail themselves of the privileges of insolvent debtors.

CONSTITUTIONAL LAW—IMPRISONMENT FOR NONPAYMENT OF FINE.—A judgment in a bastardy proceeding, which directs that, upon default in giving the required recognizance, execution do issue as for a penalty of twenty-five dollars annually, and that the defendant be confined on execution in the jail in case the execution be returned *nulla bona* as in a *capias ad satisfaciendum*, until he shall pay twenty-five dollars and the costs, is not open to the objection, that the defendant is thereby ordered to perform what may be an impossible act, and thus be subjected to perpetual imprisonment. Such a judgment does not purport to deny him the privilege accorded by the statute of procuring his release in the same manner as other insolvent debtors.

W. A. Brewer, upon his conviction under the Bastardy Act, was sentenced as follows: "The sentence of the court is, that the defendant, Rainey Brunson, be required to execute a bond, with two sufficient sureties, in the sum of three hun-

dred dollars, with condition to pay twenty-five dollars annually for the support of the male bastard child of Theny Campbell. If the said defendant fail to give said bond, that execution do issue as for a penalty for twenty-five dollars annually, and that he be confined on execution in the jail in case the execution be returned *nulla bona*, as in a *capias ad satisfaciendum*, until he shall pay twenty-five dollars and the costs, and thereafter, each year, to be subject to arrest under said execution, in like event, until he shall pay for the support of said child twenty-five dollars annually for the support of said child for the period of twelve years." He thereupon appealed.

Prince and Stevenson, for Brewer.

Ferd D. Bryant, for Brunson.

Johnson, solicitor for the state, in both cases.

285 McIVER, J. These two cases, involving practically the same question, were heard and will be considered together. That question is, whether a person who has been convicted of bastardy, who fails or refuses to enter into the recognizance, as required by law, for the support of his bastard child, can, after execution against his property has been returned wholly or partially unsatisfied, be arrested under a writ of *capias ad satisfaciendum* and committed to jail, subject, however, to the privileges accorded to insolvent debtors arrested under a similar writ.

A brief examination of the statutory provisions on this subject will show that this question must be answered in the affirmative. Section 1579 of the General Statutes provides that where a woman has been delivered of a bastard child, and she, on oath before a trial justice, declares who is the father of such child, "it shall be the duty of such trial justice to issue a warrant to apprehend and bring before him, or some other trial justice, the person so accused, who shall be required to enter into a recognizance," as prescribed by that section, conditioned for the support of such child for the period fixed by the section. If, however, the person so accused shall deny that he is the father of such child, then section 1582 provides that "a jury shall be charged, in the court of sessions, to try the question whether the accused is, or is not, the father of such child or children; and, on his acquittal, he shall be discharged; or, if convicted, he shall be required to give the

security or recognizance hereinbefore required; and, in default thereof, shall be liable to execution, as are defendants convicted of misdemeanors."

Then turning to section 2661, we find that where a person so convicted shall fail to pay the fine imposed, together with the costs of prosecution, "then a writ, in the nature of an execution, shall issue, by virtue of which the sheriff, or his deputy, shall sell (in the same manner as property is sold under execution in civil cases) so much of the offender's estate, real or ^{see} personal, as may be necessary to satisfy the fine," etc. The next section (2662) provides: "If the sheriff, or his deputy, return, on oath, that such offender refused to pay, or has not any property, or not sufficient whereon to levy, then a writ of *capias ad satisfaciendum* shall issue, whereby he shall be committed to the common jail, until the forfeiture, costs, and charges shall be satisfied—entitled, however, to the privilege of insolvent debtors," which privilege, and how it is to be obtained, is fully set forth in chapter 96 of the General Statutes.

These statutory provisions clearly show that the judgments rendered in these two cases were fully warranted by the law as it is written. It is claimed, however, that this court has, in two cases, held that a person convicted of bastardy cannot be imprisoned, either as a punishment for that offense, or as a means of enforcing the giving of the required recognizance. The first case is *State v. Glenn*, 14 S. C. 118. Outside of the question of jurisdiction, which was elaborately considered, but which has no application to this case, the only question there presented was "whether the judgment of the court of general sessions, appealed from, is in conformity with law." All that is said upon that question will be found in the last paragraph of the opinion, on page 184, and is in these words: "The sentence of the general sessions was not conformable to law. The statute provides that, on conviction for bastardy, the defendant shall be required to give the security or recognizance hereinbefore provided, and on default thereof shall be liable to execution as are defendants convicted of misdemeanors. The sentence in the present case was 'that defendant, Abraham Glenn, give bond in the sum of three hundred dollars, for the maintenance of the child until it reaches the age of twelve years, and in default thereof be imprisoned in the county jail for the period of six months, and execution issue against defendant's property.' The statute confers no

authority to impose punishment for a fixed period, or in the nature of alternative punishment." That case, therefore, does not touch the question at present under consideration, but simply decides that imprisonment as a punishment for the offense of bastardy cannot ²⁶⁷ be imposed for a fixed period or as an alternative punishment; and in that we fully concur.

But imprisonment as a punishment for crime and imprisonment under a writ of *capias ad satisfaciendum*, from which a party may at once relieve himself by exercising the privilege accorded to him by the statute, are two very different things. One is resorted to as a means of punishing an offense, while the other is for no such purpose, but simply for the purpose of compelling the party arrested under a *capias ad satisfaciendum* to apply his property to the payment of the penalty imposed upon him for the breach of the criminal law. Indeed, if Glenn's case has any application at all to the present case it rather recognizes the view which we have adopted than otherwise; for that case plainly implies that a defendant convicted of bastardy, who fails to give the required recognizance, shall be liable to execution as are defendants convicted of misdemeanors, which, as we have seen, means liable to arrest under a *capias ad satisfaciendum*, in the event of a return of the execution against property unsatisfied in whole or in part.

The other case relied on is *State v. Quick*, 25 S. C. 110. But in that case the judgment was that the defendant be committed to prison, "there to remain until he shall enter into recognizance" for the support of the child as the law prescribes, "and in default of defendant giving said recognizance, that execution for the said amount and for the costs do issue against the property of the said defendant as in case of defendants convicted of misdemeanors," and the only question made by the appeal was whether there was error "in imposing the punishment for imprisonment in default of defendant entering into recognizance for the support of the child"; and no question was raised or considered as to the kind of execution which might be issued against the defendant in such a case, or as to the mode of enforcing the same; but the court simply held that there was no law authorizing the imposition of punishment by imprisonment upon a person convicted of bastardy. That case, therefore, clearly has no application to the question under consideration.

Again, it is urged that proceedings in a case of bastardy are civil rather than criminal in their nature, and the amount

§§ which the defendant, upon conviction, is required to pay is a debt for the nonpayment of which a party cannot be imprisoned without violating section 20 of article 1 of the constitution of this state, which declares that "no person shall be imprisoned for debt except in cases of fraud." While it is true that the counsel for the appellant, Brewer, has cited cases from other states which seem to support the view that bastardy proceedings are civil rather than criminal in their nature, yet we think that the question must be determined by the provisions of the constitution and statutes of this state. So considered, it is clear to our minds that such proceedings are of a criminal, and not of a civil, nature. By section 1 of article 4 of the constitution of this state the court of general sessions is vested with criminal jurisdiction only, and, as our statute (section 1582 of the General Statutes) expressly requires that the issue in such cases shall be tried in that court, it would seem to be conclusive that the legislature intended to make the offense of bastardy a criminal offense. And as a further indication of such intention, the proceeding is commenced just like other criminal cases by the issue of a warrant to apprehend the party charged (section 1579), and the use of the words "accused," "acquitted," "convicted," in section 1582, followed by the provision in the same section that, upon conviction, the accused shall be liable to execution as are defendants convicted of misdemeanors, all point to the same conclusion. Accordingly the unbroken practice has always been to treat a charge of bastardy as a criminal offense, for which the accused is indicted and tried in the court of sessions, just as in the case of other misdemeanors. Hence whatever may be the view taken in other states, where they may have different statutes and different rules of practice, we cannot doubt that, in this state, a charge of bastardy must be, as it has always been, regarded as a criminal proceeding, instituted not for the purpose of recovering or enforcing the payment of a debt, but for the purpose of subjecting the party charged to the penalty imposed by statute for a violation of the law.

So, regarding a proceeding in a case of bastardy, we think it clear that the penalty which one convicted of that offense §§ incurs cannot be regarded as a "debt," in the sense of that term as used in section 20, article 1, of the constitution: See the authorities collected in 5 Am. & Eng. Ency. of Law, 148 et seq., as well as in volume 10 of the same valuable

work, at page 212 et seq. In the case of *State v. Mace*, 5 Md. 337, where it was held that a fine imposed for the violation of a statute is not a "debt," within the constitutional provision forbidding imprisonment for debt, the court said, substantially, that the constitution ought to receive a common-sense interpretation—that is to say, the sense in which it was understood by those who adopted it; and, if it be so construed, the term "debt" is to be understood as an obligation arising otherwise than from the sentence of a court for the breach of the public peace or commission of other crime. The people who adopted it evidently so understood it. "*They regarded it, as it was intended, a protection to the unfortunate, and not an immunity to the criminal.*" (Italics ours.) This, we think, is the true view of the matter. And so it was held in the case of *In re Wheeler*, 34 Kan. 96, that the charge against the father of a bastard child for its maintenance is not a debt within the terms of the constitutional provision forbidding imprisonment for debt except in cases of fraud: To same effect see *Musser v. Stewart*, 21 Ohio St. 353, and *Ex parte Cottrell*, 13 Neb. 193. See, also, *Ex parte Robinson*, 27 Tex. App. 628; 11 Am. St. Rep. 207.

We are of opinion, therefore, that the judgments rendered in these two cases are not in violation of the constitution.

In Brunson's case it is further urged that the judgment rendered does not conform to the provisions of the act, inasmuch as it directs that upon default in giving the required recognizance "execution do issue as for a penalty for twenty-five dollars annually, and that he be confined on execution in the jail" until he performs what may be an impossible act, and thus be subjected to perpetual imprisonment. But this position ignores the words which follow immediately after the words quoted from the judgment, viz., "in case the execution be returned *nulla bona*, as in a *capias ad satisfaciendum*"; and, when this omission is supplied, it seems to us that the judgment, properly construed, means the same thing as that rendered in ²⁷⁰ Brewer's case—that is to say, if the defendant fails to give the required recognizance, and the execution against his property which the statute requires to be first issued shall be returned unsatisfied, in whole or in part, then the defendant shall be arrested under a *capias ad satisfaciendum*, when, under the statute, he may avail himself of the privileges accorded to insolvent debtors. While, therefore, the judgment rendered in Brunson's case is not so full and

explicit as that rendered in Brewer's case, yet they substantially mean the same thing, and the objection taken in Brunson's case is not, therefore, well founded.

The judgment of this court is, that the judgment of the circuit court in each of the cases above stated be affirmed.

What Statutes Violate Prohibitions Against Imprisonment for Debt.

1. Debt, Meaning of, as Used in Constitutional Prohibitions Against Imprisonment for Debt.—In *State v. Mace*, 5 Md. 337, it was said that the word "debt," as used in constitutional or statutory prohibitions against "imprisonment for debt," means an obligation arising otherwise than from a breach of the peace or a crime. This definition, however, is somewhat imperfect, and, for the purposes of the present note, the doctrine deducible from the adjudged cases on this subject may be stated thus: These prohibitions include all contractual obligations, but not those of a penal or quasi-penal character. In other words they afford no protection to a defendant who has committed a crime, a tort, or a contempt of court.

2. That Debts Arising from Contract Fall Within the Statutory Prohibition is undisputed, and it will therefore be sufficient to cite a few cases in which this doctrine is explicitly announced: *In re Wheeler*, 34 Kan. 96; *Lower v. Wallick*, 25 Ind. 68; *Rich v. People*, 66 Ill. 513; *Kennedy v. People*, 122 Ill. 649; *Ex parte Hardy*, 68 Ala. 303.

As that which is prohibited to be done directly cannot be accomplished by indirection, the legislature cannot declare the mere nonperformance of a contract to be a misdemeanor, for that would amount to an attempt to legalize imprisonment for debt: *State v. Paint Rock etc. Co.*, 92 Tenn. 81; 36 Am. St. Rep. 68. In *Dean v. Smith*, 23 Wis. 483, 99 Am. Dec. 193, which was an action to compel an account, and payment of an alleged excess of partnership profits in the defendant's hands, the defendant was arrested on a writ of *ne exeat*, and his counsel sought to have the writ vacated on the ground that the obligations of partners to each other, on account of dealings in the scope of the business, necessarily arise out of contract, that the action was simply one to ascertain and collect a debt, and that under such circumstances the arrest was unconstitutional. The court, however, held that the writ merely prevented a person from going out of the jurisdiction of the court until he had given security for his appearance, and was not imprisonment for debt, within the proper meaning of the words. The use of this writ, however, except in cases where the departure of the defendant is for the purpose of evading the jurisdiction of the court, has been felt to be scarcely in harmony with the spirit of the constitutional provision, and in New York (and perhaps other states) all controversy on the subject has been obviated by enacting that "the writ of *ne exeat* is abolished."

3. Exception in Cases of Fraud.—Many of the constitutions qualify the prohibition against imprisonment for debt by words which deprive a fraudulent debtor of its protection. In *Moore v. Mullen*, 77 N. C. 328, it was said that the clause "except in cases of fraud" is intended to cover not merely fraud in procuring a contract, but fraud in attempting to evade performance, as by concealing property, or attempting to run it out of the state, or making a fraudulent disposition of it." So, also, in *Ex parte Clark*, 20 N. J. L. 648, 45 Am. Dec. 394, it was laid down that "whether the fraud be in relating to the time and manner of creating a debt, or to subsequent attempts to de-

feat the recovery of it by the ordinary process of the law can make no difference." That was a case, in which it was alleged in the affidavit upon which execution had issued against the defendant's body that he had "unlawfully and unjustly" refused to apply certain money in a third person's hand to his use to the payment of his debt to the plaintiff. The court in replying to the argument of counsel that such conduct was not fraudulent made these remarks: "The true spirit of the constitution is this: the honest debtor who is poor, and has nothing to pay with, shall not be imprisoned at the mercy of his creditor. But if the debtor, instead of putting himself upon his honest poverty, seek to elude the jurisdiction and process of the courts; if he conceal, or assign, or remove his property, or keep it out of the reach of his creditors; or if he have the means in his pocket, or under his control, of paying his debt, and refuse to do so, he is a dishonest and fraudulent man. He is the very man that the constitution says may be, and common sense and common honesty says ought to be, imprisoned, until he disgorge his money and deliver up his property, to his confiding creditor."

To the principle, that the withholding of property from a creditor by a debtor, after the respective rights of the parties have been fixed by an action, is a fraud may be referred those decisions which have upheld the validity of the statutes providing for the imprisonment of a debtor after execution has been returned unsatisfied, and it is ascertained that he has effects which are legally applicable to the discharge of his liabilities. It is true that the courts speak of imprisonment in such cases as a punishment for contempt of court: *State v. Becht*, 23 Minn. 411; *Burt v. Minneapolis Stockyard etc. Co.* (Minn. Sup. Ct., Feb. 1, 1894); *Eikenberry v. Edwards*, 67 Iowa, 619; 56 Am. Rep. 360; *In re Burrows*, 33 Kan. 675. But it seems clear on principle that the disobedience of the debtor must involve the element of fraud in order to give a court jurisdiction to attach his body under these circumstances. Otherwise the constitutional safeguard would be nugatory. That this is the true view is apparent from the language of the court in *Roberts v. Stoner*, 18 Mo. 481; *Coughlin v. Ehler*, 39 Mo. 285; *Moore v. Mullen*, 77 N. C. 328; *Ex parte Clark*, 20 N. J. L. 648; 45 Am. Dec. 394; and a like conclusion may be drawn from those cases in which it has been held or assumed that the disobedience of a garnishee to an order directing him, in proceedings in aid of execution, to hand over money cannot be punished by imprisonment: *Board of Education v. Scoville*, 13 Kan. 17; *Union Bank of Rochester v. Union Bank of Sandusky*, 6 Ohio St. 255.

The only cases in which the validity of an execution against the body of the defendant under such circumstances has been denied seem to be *Ex parte Grace*, 12 Iowa, 208, 79 Am. Dec. 529, and *Ex parte Hardy*, 68 Ala. 303. The former, however, went on the ground that the penalty of imprisonment could not be imposed in the prescribed manner without depriving the defendant of his right to a trial by jury, and the court expressly conceded that, if his fraud were once found by a competent tribunal, he would lose the protection of the constitutional prohibition. The case is, therefore, really not in conflict with a subsequent one in the same state, *Eikenberry v. Edwards*, 67 Iowa, 619, 56 Am. Rep. 360, except in so far as the latter denies that any right to trial by jury exists under such circumstances. *Ex parte Hardy*, 68 Ala. 303, was decided with reference to a constitution, in which the exception in cases of fraud was omitted, and the majority of the court, upon a review of the earlier legislation on the subject, in which there was no such omission, held that the prohibition in its new form must be construed as a denial of the right to compel by imprisonment the delivery of property

fraudulently withheld by a judgment debtor. A good deal of stress was also laid upon the very general terms of the statute, and it was thought that in sustaining its validity the court would be admitting the legality of incarcerating debtors even without proof of fraudulent conduct. Some importance, too, was attached to the fact that there was no provision made for bail, and that the defendant was by the enactment in question deprived of his right to trial by jury. An elaborate dissenting opinion was delivered by Chief Justice Brickell, in which he showed very satisfactorily that the statute merely embodied the ordinary procedure of a creditor's bill, a theory supported by *Adams v. Hackett*, 7 Cal. 201; *Pacific Bank v. Robinson*, 57 Cal. 520; 40 Am. Rep. 120; *Lynch v. Johnson*, 48 N. Y. 33; that it did not deprive the debtor of his right to trial by jury any more than such right might be said to be denied in all equitable proceedings, and that the imprisonment allowed was not for debt, but for the neglect and refusal to perform a moral and legal duty, when it was shown that such performance was within his power. The learned judge also pointed out that the logical conclusion from the doctrine of the court would be, that the provisions usually introduced in insolvent laws, by which a debtor who refuses to surrender his property for the payment of his debts may be compelled to do so by imprisonment, are infringements of a constitution worded like that of Alabama, a result which "it was scarcely possible to believe could have been intended by any body of men who ever assembled to frame organic laws for a state." The reasoning of this dissenting opinion seems to us to be far sounder than that of the majority of the judges, whose conclusion that the omission to make the usual exception of cases of fraud in the constitution carried with it the sweeping consequence, that courts of equity were henceforth to be disabled from exercising a salutary jurisdiction which they had possessed from the earliest times, pushes, as we venture to think, the principle of ascertaining legislative intent by mere implication to an unwarrantable and dangerous extreme.

4. *That the Constitutional Prohibition Does Not Apply to Proceedings in Tort* is well established: *People v. Cotton*, 14 Ill. 414; *McKindley v. Rising*, 28 Ill. 337; *Ex parte Hardy*, 68 Ala. 303; *Rich v. People*, 66 Ill. 513; *Long v. McLean*, 88 N. C. 3; *Blair's case*, 4 Wis. 537; *Howland v. Needham*, 10 Wis. 495; *Cotton v. Sharpstein*, 14 Wis. 226; 80 Am. Dec. 774; *Hoover v. Palmer*, 80 N. C. 313; *Fuller v. Bowker*, 11 Mich. 204; *Kinney v. Laughenour*, 97 N. C. 325. Thus a statute is not unconstitutional which provides that a defendant in an action of trover, who does not produce the property sued for, and fails to give bond for the eventual condemnation money, may be committed to jail until he complies with an order to that effect: *Harris v. Bridges*, 57 Ga. 407; 24 Am. Rep. 495. "If," said the court, "one man obtains the possession of the personal property of another by violence, or, while he has possession of it, there is reason to believe that it will be eloiigned or moved away, or will not be forthcoming to answer the judgment that may be made in the case, there would seem to be no good reason why he should not be proceeded against and be required to comply with the terms of the statute; and, if the defendant should be imprisoned in accordance with the terms of the statute, on his failure to comply therewith, he cannot be said to have been imprisoned for debt." So also, though a statute authorizing the arrest of the defendant in an action for the breach of a promise to marry is invalid, on the ground that the constitutional prohibition applies to all obligations arising out of contract: *Moore v. Mullen*, 77 N. C. 327; *Tyson's case*, 32 Mich. 262; the defendant in such an action may be arrested if the affidavit upon which the

warrant for his commitment is founded contains an averment that, by means of such promise to marry, he succeeded in seducing the plaintiff: *Perry v. Orr*, 35 N. J. L. 295; *Sheahan's case*, 25 Mich. 145. The principle of these rulings is that the conduct of the defendant, under such circumstances, amounts not merely to the breach of a contract, but to the perpetration of a fraud also. That the failure to perform a contractual obligation may, when complicated with fraud, be visited even with penal sanction: See *State v. Norman*, 110 N. C. 484, referred to in section 5, *post*.

5. *Prohibition Not Applicable to Criminal Proceedings.*—A large number of cases are found in which it has been sought to bring commitments for a failure to pay fines imposed for an infraction of penal laws within the protection of the constitutional prohibition, but the courts have uniformly refused to countenance this view: *Dixon v. State*, 2 Tex. 481; *Kennedy v. People*, 122 Ill. 649; *Mosley v. Gallatin*, 10 Lea, 494; *Ex parte Hardy*, 68 Ala. 303; *Lee v. State*, 75 Ala. 29; *State v. Leach*, 75 Ala. 36. The only question which it is competent for the courts to ask in this connection is, whether the legislature had power to visit the act with penal sanctions at all. Thus public officers are at common law indictable for malfeasance or misfeasance in office, and the constitutional prohibition cannot be construed as being designed to prevent the enactment of laws punishing such offenses by imprisonment or otherwise, as the public interests may require. Therefore a statute is constitutional which provides that a tax collector who willfully neglects for six months to pay over taxes collected by him shall be imprisoned, upon being duly convicted of the offense: *State v. Nicholson*, 67 Md. 1. So, too, although the mere breach of a contract cannot, as we have seen above (sec. 2), be made criminal by declaring it to be so, the legislature may validly enact that one who, with intent to defraud, procures advances of money or other articles of value, upon a promise to begin work on a specified day for the person making the advances, and fails to perform his contract without lawful excuse, is guilty of a misdemeanor: *State v. Norman*, 110 N. C. 484. Since it is universally conceded that the constitutional prohibition is not applicable to liabilities incurred through the commission of torts, the principle underlying this decision may perhaps be generalized thus: It is competent for the legislature to punish a breach of contract, either directly or as an alternative to the imposition of a fine, whenever the circumstances are such as to show that the defaulter is chargeable with moral, and not merely with legal, fraud.

6. *Prohibition Not Applicable to Defendant's Obligation to Pay Costs of Criminal Prosecution.*—The courts are unanimous in affirming the validity of statutes directing that the defendant in a criminal proceeding may be imprisoned for failing to pay the costs of the prosecution. This doctrine rests on the simple principle that the legislature having the power to define the punishment of crimes, has also the power to declare that the payment of the costs of procuring the conviction of the guilty party shall be deemed a part of such punishment: *Caldwell v. State*, 55 Ala. 133; *Kennedy v. People*, 122 Ill. 649; *Ex parte Boyd*, 34 Kan. 570; *McCool v. State*, 23 Ind. 127; *Smith v. State*, 23 Ind. 132; *Boyer v. Kinnick* (Iowa Sup. Ct., Jan. 30, 1894); *State v. Wallin*, 89 N. C. 578; *Dixon v. State*, 2 Tex. 481. Upon an analogous principle it is held that the Kansas statute is valid which provides that when, upon a trial before a justice of the peace for misdemeanor, it shall be found that the prosecution was instituted maliciously, the prosecuting witness shall be adjudged to pay the costs, and, unless a bond is given therefor, shall be committed to the county jail until they are paid: *In re Ebenhack*, 17 Kan. 618. Such a

statute, as the court remarked, is merely a declaration that an unwarranted appeal, in this class of cases, to the criminal law, is itself a violation of the law, for which the penalty imposed is the costs of the unwarranted proceedings.

7. *Obligation of Father of Bastard Child to Pay for Its Support, Whether a Debt.*—In an early Iowa case, *Holmes v. State*, 2 G. Greene, 501, the court said that the constitutionality of a statute providing that in case the putative father of a bastard child should neglect to give the security required for the payment of the sum decreed for its maintenance, and also pay the costs of the prosecution, he should be committed to jail, there to remain until he should comply with the order of the court, or until such court should, on sufficient cause shown, order him to be discharged, depends on whether the proceedings through which the liability becomes fixed are civil or criminal. The conclusion reached was that those proceedings were of a civil nature, and, although the woman was permitted to bring to her assistance the forms of criminal law, the real object of the complaint was to obtain an amount sufficient to maintain the child, and thus enforce his obligation to support his offspring. The reasoning of the court in this case has not found acceptance elsewhere. It was said, in *Ex parte Cottrell*, 13 Neb. 193, to have been decided under a misapprehension of the law, and to have been never referred to with approval. So far as the first portion of this condemnatory allusion is concerned it is scarcely correct, for several cases are cited in *Holmes v. State*, 2 G. Greene, 501, to the point that bastardy proceedings are civil. But the inference drawn from this circumstance was plainly erroneous. Conceding the liability of the father to be civil, it is certainly not contractual, and there is no dispute as the proposition that the constitutional prohibition applies only to obligations arising *ex contractu*. As was pertinently said in *Musser v. Stewart*, 21 Ohio St. 353, "the liability sought to be enforced originates in the wrongful act of the defendant, against the consequences of which the statute is designed to protect the public." But to speak of such suits as civil seems to be a misapplication of language. If not criminal in a strict sense, they are at least *quasi* criminal, and the view which is most rational, and now generally accepted, is that which is thus expressed in the case last cited. "The statute is in the nature of a police regulation. Its main object is to furnish maintenance for the child, and indemnity to the public against liability for its support. The act of the putative father is regarded as an offense against the peace and good order of society, and the penalty which the law imposed for his transgression is to enforce upon him the duty of making provision for the maintenance of his illegitimate offspring." To the same effect see *Ex parte Cottrell*, 13 Neb. 193; *In re Wheeler*, 34 Kan. 96; *Lowier v. Wallick*, 25 Ind. 68, overruling *Byers v. State*, 20 Ind. 47; *Rich v. People*, 66 Ill. 513. In the last-mentioned case it was expressly ruled that a previous decision of the same court holding that such prosecutions were civil in their nature did not involve the conclusion that the constitutional prohibition was applicable to the obligation imposed upon the father under such circumstances.

8. *Reduction of Cause of Action to Judgment, Effect of.*—In *Ex parte Prader*, 6 Cal. 239, it was held that a defendant in an action for assault and battery could not be arrested on the judgment. The reasoning of the court was that a judgment was a debt, and that, as the constitution had made no exception except in the case of fraudulent debts, a statute which directed the imprisonment of a defendant could not be valid, unless that element was present. This theory cannot be reconciled with the doctrine commonly held, that

proceedings in tort are not within the purview of the constitution, and that, unless the liability of the defendant originates in contractual relations, he is not protected from commitment to jail at the instance of the injured party. It involves the singular consequence that an alleged wrongdoer may be arrested and held to bail, while his liability is still unsettled, but that, the moment it is ascertained that he is guilty of the wrong with which he is charged, he must be liberated and the injured party left to take his chances with ordinary contract creditors. In view of the circumstances which led to the insertion of the prohibition against imprisonment for debt in the various state constitutions, it seems scarcely possible that such a result could have been contemplated. The more correct view, we venture to think, is that stated in *Moore v. Green*, 73 N. C. 394, 21 Am. Rep. 470, which was an action for libel, where the following remarks were made by Judge Rodman: "No doubt the framers of the constitution had in mind the familiar classification of actions" (by which they are divided into those which arise *ex contractu* and those which arise *ex delicto*), "and in forbidding imprisonment for debt, they referred rather to the cause of action as being *ex contractu*, than to the form it would assume upon a judgment. If they had meant to forbid imprisonment in every civil action, they would have said so. But by forbidding it for debt, they plainly imply that it may be allowed in actions, which are not for debt. In forbidding imprisonment for debt, as popularly understood, viz: for a cause of action arising *ex contractu*, they responded to the general public sentiment; but I know of no writer who has recommended the abolition of punishment for trespassers and wrongdoers. Such a provision might be humane to the injuring, but it would not be so to the injured, parties. It would withdraw from the state its power to impose a wholesome check on violence and wrong, and would tend to license disorders and law-breakings incompatible with the peace and welfare of society."

9. *Imprisonment for Contempt of Court, How Far Unconstitutional.*—As a general rule it may be said that the prohibition against imprisonment for debt has no application to the liability which is incurred by disobedience to an order of court: *Ex parte Robinson*, 27 Tex. App. 628, 11 Am. St. Rep. 207, where it was held that the failure of a constable to execute a writ of sequestration might be punished by the infliction of a fine, and, if such was not paid, by imprisonment, although the amount of the fine would inure to the benefit of the plaintiff in the action in which it was issued. The effect of this principle has been discussed above (sec. 3), in dealing with the exception which most constitutions make in the case of fraud. It was there shown that the weight of authority is in favor of the view that the payment of a sum of money may be enforced by attachment of the defendant's body, in proceedings supplementary to execution, if his failure to pay the judgment is due not to mere inability to satisfy the demands of his creditors, but to a fraudulent purpose to evade his liabilities by withholding effects which should properly be applied to the discharge of his debts, and that, under no other circumstances, can a judgment in an action arising *ex contractu* be enforced in this manner.

The effect of the constitutional provision upon punishments for contempt has also been discussed in regard to divorce proceedings, and it is generally held that statutes which give, either expressly or by implication, the power to enforce, by a body attachment, compliance with a decree for the payment of alimony, are valid: *Ex parte Perkins*, 18 Cal. 60; *Wightman v. Wightman*, 45 Ill. 167; *Carlton v. Carlton*, 44 Ga. 216; *Steller v. Steller*, 25 Mich. 159. In *Wood v. Wood*, Phill. (N. C.) 538, it was said that "alimony could not

be considered in any other light than as a debt," but that the statute abolishing imprisonment for debt was applicable only to ordinary proceedings in a court of law. What construction would have been placed upon a simple constitutional provision, had such existed in North Carolina, is only a matter of inference. In *Ex parte Perkins*, 18 Cal. 60, the court declared that alimony was not a debt within the meaning of such a provision. Whichever view is correct, it seems to be clear, from the above cases, that decrees for the payment of alimony cannot be enforced by imprisonment, if the defendant is unable to pay, and that, in this respect, they stand upon the same footing as orders made during proceedings in aid of execution.

10. *Discharge of Persons Imprisoned.*—In some cases the statutes provide expressly for the discharge of one who is committed for nonpayment of fines or costs, when it satisfactorily appears that he is unable to liquidate them: *Kennedy v. People*, 122 Ill. 649; *Dixon v. State*, 2 Tex. 481. In Kansas the objection that imprisonment for disobedience to an order of court might continue an unreasonable time is obviated by a provision that incarceration for such a cause shall not last for more than one year: *In re Wheeler*, 34 Kan. 96. Even without such a provision it would seem, on general principles, that as the inability to pay negatives the existence of that contumacy which is a necessary element of a contempt of court, no one can be detained after he establishes the fact of his inability, and so it has been held in *Ryan v. Kingberry*, 89 Ga. 228. In other cases it is said that the prisoner's proper remedy is to take advantage of the insolvent laws: *Rogers v. State*, 5 Yerg. 368; *Wood v. Wood*, Phill. (N. C.) 538. The principal case shows that this remedy has, in South Carolina, been converted into a statutory one. But whether the inability of a defendant to discharge the pecuniary liability imposed upon him is ascertained by regular insolvency proceedings, or simply by producing the necessary evidence in the court from which the order for his commitment was issued, it is possible that no legislation would be valid which would undertake to deprive one so situated of the privilege of procuring his release in one or other of these ways. Thus it was strongly intimated in *Ex parte Russellville*, 95 Ala. 19, though not directly ruled, that a provision in a municipal charter authorising the corporate authorities, on nonpayment of the fine and costs imposed upon conviction for the violation of an ordinance, to impose hard labor or imprisonment, "until the fine and costs are paid," is unconstitutional. "It is to be noted," said the court, "that the act does not contemplate hard labor or imprisonment as alternate punishment, or as punishment to be imposed in lieu of the fine, but as means of coercing the payment of the fine; and while it may be that the defendant could be put to hard labor, at a reasonable rate of compensation, for a sufficient length of time for his earnings to equal the fine and costs, we are inclined to the opinion that, in so far as the provision in question undertakes to authorize his imprisonment until the fine and costs are paid, it is inoperative and void. Otherwise, the imprisonment might be for a period indefinite as the duration of the defendant's life, and have much in common with imprisonment for debt, which the organic law inhibits." On the other hand, it may perhaps be reasonably argued that, in view of the ordinary canon of statutory construction, that the presumption is always in favor of constitutionality, the provision here objected to should be taken as being subject to the qualification of the general principle referred to above—that when imprisonment is imposed as a means of coercing the payment of a fine, it cannot be continued after the inability of the defendant to discharge it has been

ascertained. The presumption that the Alabama statute was enacted with reference to that principle is perhaps sufficiently strong to obviate the inference that it authorized imprisonment for an indefinite period, and was therefore void.

HERNDON v. GIBSON.

[88 SOUTH CAROLINA, 257.]

JUDICIAL SALES, DEPRESSING BIDS.—Any statement made by a purchaser at a judicial sale that she is a widow, dependent on the premises for support, and wishes no one to bid against her, though true, requires the vacating of the sale, if it prevents other persons from bidding.

SUIT to set aside a foreclosure sale, on the ground that the defendant, Mrs. Gibson, at the time of the sale, stated in the presence of the persons there assembled that she was a widow, dependent on the property for her support, and wished no one to bid against her. The trial court decided that, because her statements were true, they could not be fraudulent, nor could they justify the vacating of the sale to her. Complainant appealed.

Verner and Herndon, for the appellant.

Stribling and Shelor, for the appellee.

259 **POPE, J.** The plaintiff obtained a judgment foreclosing a mortgage, executed by the defendant, Mrs. Gibson, to secure a sum of money borrowed by her from the endowment fund of Adger College, on a tract of land of some 250 acres, in Oconee county in this state. The debt in judgment was \$770.01, and costs, \$51.05. At the sale of the mortgaged premises by the master for Oconee county, the defendant, Mrs. Gibson, publicly announced that it was her intention to bid at such sale; that she was a widow, dependent upon such premises for a support, and requested that no one would bid against her. Such action on her part prevented two persons, who attended such sale to bid for the same, from bidding, one of whom was willing to give \$800 therefor. Mrs. Gibson, the defendant, bid \$100. There was no other bidder. The same was knocked down to her as the highest bidder. Immediately thereafter she induced the defendant, Mrs. Biemann, to advance the \$100, which was paid to the master, with the request that title should be made to Mrs. Biemann, who had 260 agreed with Mrs. Gibson to hold the title to secure the loan of the \$100.

Thereafter, and very soon, the plaintiff, as receiver of the Adger College, obtained leave of the court to bring an action to set aside such sale, upon the ground that the conduct of Mrs. Gibson, the defendant in the foreclosure action, had chilled the sale and prevented a fair competition, alleging that the property was worth about \$1,000. He not only alleged the foregoing facts, but suggested that the defendant, Mrs. Biemann, had participated in the conduct of Mrs. Gibson. The matter came on to be heard by Judge Fraser on the pleadings and affidavits. It should be stated that Mrs. Biemann denied any and all knowledge of the matters herein referred to, and that Mrs. Gibson exonerated her from any participation therein. The other defendant, Holleman, is master for Oconee county, and is included as a party to prevent a deed to the premises being executed by him to Mrs. Biemann. The decree of the circuit judge dismissed the complaint, thereby denying the prayer of the plaintiff for any relief. In his decree, he finds the property worth \$1,000; that Mrs. Gibson did use the language attributed to her at the sale, but held that she told the truth when she stated that she was a widow, dependent upon these lands for a support, and did not wish anyone to bid against her, and so requested; that, therefore, she was guilty of no fraud, as she concealed nothing, nor did she misrepresent anything. From this decree, the plaintiff has appealed, upon four grounds. The decree and grounds of appeal should appear in the report of the case.

We cannot agree with the circuit judge. Under the laws of this state, fraud in the concealment or misrepresentation of facts is not the only fact which will vitiate a public sale. Anything by a party in interest that chills the sale—prevents free competition amongst the bidders—will, on complaint, cause such a sale to be set aside. *Carson v. Law*, 2 Rich. Eq. 296, is an apt illustration of this principle of our laws. In this last-mentioned case, when the bidder offered \$1,000 for a lot of nine negro slaves, announcing, when he did so, that it was his purpose to send them as a gift to the ³⁶¹ wife and children of the defendant in execution; his bid was the only bid; he paid the purchase money, and sent the slaves to the wife and children of the defendant in execution. He, therefore, told the truth; he concealed nothing; he misrepresented nothing; his conduct was generous; yet the court of last resort in this state set the sale aside. That it is a principle ingrafted upon our laws that at public sales fair competition must

exist, is too long and firmly settled by our decisions to need comment: *Hamilton v. Hamilton*, 2 Rich. Eq. 355; 46 Am. Dec. 58; *Martin v. Evans*, 2 Rich. Eq. 368; *Dudley v. Odom*, 5 S. C. 131; 22 Am. Rep. 6; *Barrett v. Bath Paper Co.*, 13 S. C. 128. It follows, therefore, that the circuit judge was in error.

It is the judgment of this court, that the judgment of the circuit court be reversed, and the cause be remanded to the circuit court to enforce, by its decree, the principles herein, with directions, however, that the defendants, Mrs. C. H. Biemann and Joseph W. Holleman, master, shall not be liable for any costs.

JUDICIAL SALES—STIFLING COMPETITION IN BIDDING.—Public judicial sales should be so conducted as to produce as much as possible for the parties in interest, and to that end full, free, and fair competition should be secured: *De Grauw v. Mechan*, 48 N. J. Eq. 219. A conspiracy to deter bidders at a judicial sale is such a fraud as will render the sale invalid: *Pekin Min. Co. v. Kennedy*, 81 Cal. 356; note to *Farr v. Sims*, 24 Am. Dec. 408. See, also, the extended note to *Tyler v. Herring*, 19 Am. St. Rep. 293, where the effect on trustees' sales of the stifling of bidding is discussed. For a discussion of the validity of contracts to stifle bidding at public sales, see *Barton v. Benson*, 126 Pa. St. 431; 12 Am. St. Rep. 883, and note with the cases collected.

WHITNEY MANUFACTURING COMPANY v. RICHMOND AND DANVILLE RAILROAD COMPANY.

[38 SOUTH CAROLINA, 355.]

CARRIERS—DELIVERY, EVIDENCE INCOMPETENT TO SHOW COMPLETION OF.

In an action by a consignee to recover the value of goods burnt in one of the defendant's cars, while it was lying on a siding, constructed solely for the use of the plaintiff, testimony as to the manner in which the defendant has been accustomed to deliver goods to consignees at a public siding is incompetent in regard to the question whether the delivery to the plaintiff was complete.

CARRIERS—DELIVERY, COMPLETENESS OF, WHEN A QUESTION FOR THE COURT.—Whether the delivery of goods is completed is a mixed question of law and fact, but may be passed upon by the court, when there is no conflict of testimony.

TRIAL—NONSUIT, WHEN PROPER.—In the absence of all testimony in support of the material allegations in the complaint, a nonsuit is proper; but when there is any testimony directed to those allegations, the weight, truth, and sufficiency of which are to be determined, the case must go to the jury.

CARRIERS—DELIVERY OF GOODS WHEN COMPLETE.—The court is justified in pronouncing as a matter of law that the delivery of goods by a carrier is complete, where it appears from the undisputed evidence that they were transported in good condition to the place of delivery, duly re-

excepted for, and fully taken under the control of the consignee, and there is no testimony offered to show that the carrier interfered with the property in any manner after it was thus received.

CARRIERS ARE NOT LIABLE AS WAREHOUSEMEN when the property carried has once been placed in the charge of the consignee.

CARRIERS, LIABILITY OF, AFTER DELIVERY IS COMPLETE.—A railroad company is not liable for the value of goods destroyed by fire while lying in one of its cars, if those goods have been completely delivered, and are merely suffered to remain in the car for the convenience of the consignee.

RAILROAD COMPANIES—LIABILITY FOR DESTRUCTION OF PROPERTY BY FIRE. In the absence of any testimony going to show that a fire by which the plaintiff's goods were destroyed, while in a railway car upon a siding, was started by sparks from one of the defendant's locomotives, it is not error to refuse to submit to the jury the question of the company's liability under a statute relating to fires originating in this manner.

APPEAL—EXCEPTION, SUFFICIENCY OF.—An exception which merely alleges that there was error "in granting a nonsuit and dismissing the complaint," is too general to be considered.

ACTION to recover the value of property destroyed by fire, while in one of the cars of the defendant company. Amongst other questions asked of one of the plaintiff's witnesses by Mr. Simpson, the plaintiff's counsel, was this: "What do you know about the Archer switch, as to receiving cotton from the Archer switch, unloading cotton from the switch? Objection was made on the ground that what was done at the Archer switch had nothing to do with the case, unless it was shown that the Archer switch was exactly such a switch as the Whitney switch.

Mr. Simpson. "We attempted to show yesterday that the manner of receiving cotton from the railroad company was the same at the Whitney switch as at the Air Line depot. We wish to show that at the Archer switch, which is considered to be in the railroad yard, cotton was received without there being an agent there to turn it over, just as there was no agent at the Whitney switch. We want to show what the defendant's agent said to this witness relative to taking cotton from the cars at the Archer switch."

By the COURT. "So far as we know, no one ever got any cotton or anything else at the Whitney switch except the plaintiff himself, and this makes the switch quite a different switch from the Archer switch, about which we know nothing so far, from the testimony, except that it is called a switch. I do not think the question is competent."

Bomar and Simpson, for the appellant.

Duncan and Sanders, for the appellee.

366 POPE, J. The plaintiff, appellant, shipped by the defendant, respondent, thirteen bales of cotton in December, 1889. It appears from the "case" that they had made an arrangement with each other whereby all machinery and cotton shipped by the appellant over the respondent's road should be delivered at a switch known as the "Whitney switch," it being a sidetrack alongside the respondent's leased railroad, about two miles distant from Spartanburg; this "Whitney switch" having been graded by the appellant, and the track thereof having been constructed by the respondent. No other customer of the respondent other than the plaintiff, appellant, ever used said "Whitney switch" as the point of delivery by the respondent. The cotton having been destroyed by fire, some time in December, 1889, while the same was being unloaded from a car of the defendant, respondent, placed on said "Whitney switch," a contention arose as to which party should bear the loss. The complaint alleges that such cotton was destroyed by fire while in the custody of the defendant, respondent, either as a common carrier or warehouseman, or was destroyed by fire communicated to said cotton by the acts of the authorized agents and employees of said defendant, respondent, and by the negligence of said last-named party. This was denied by the answer. At the trial before Judge Fraser and a jury at January term, 1892, of the circuit court for Spartanburg, at the conclusion of the plaintiff's testimony, the defendant, respondent, moved for a nonsuit, which was granted, and after entry of judgment thereon the plaintiff appealed therefrom.

Before setting out the grounds of appeal it may be as well to notice the results established by the testimony. There was ample proof that the thirteen bales of cotton were burned in 369 the car belonging to the defendant, respondent, while on the track known as the "Whitney switch." It was proved also that this car had been placed at this point two or three days before the fire by the defendant, respondent, at the request and direction of plaintiff, appellant. It was also proved, as a part of their arrangement, that the cars should not be guarded by the respondent, and the plaintiff, appellant, had the right even to break any seals placed on the doors of the car; that this arrangement was made at the request and for the convenience of the plaintiff, appellant; that the plaintiff, appellant, had, two days before the fire, and on the day the car with this cotton had been placed on the "Whitney switch,"

surrendered to the defendant, respondent, the bill of lading for the cotton in this car; that as a further part of the arrangement between these parties, the plaintiff, appellant, had the right to remove the cotton so shipped without any superintendence by the defendant, and as a fact, that six bales of cotton had been taken out of the car before the fire occurred; that the door of the car next to the railroad track was shut; that the plaintiff, appellant, had opened and left open the door of the car on the opposite side of the railroad track; that absolutely no explanation was given as to the origin of the fire; and that the wind, on the day of the fire, blew from the direction of the car, as it stood on the "Whitney switch," to that of the main track of the railroad alongside of the car.

The grounds of appeal will be set out in the report of the case, and they will not be reproduced here, only so far as it may be necessary to understand our rulings upon the points submitted by the appellant.

First. It is contended that the circuit judge erred when he refused to allow the testimony of the witness Fleming, when it was sought to have him state the practice of the defendant, respondent, at what was known as the "Archer switch" in the yard of the railroad at Spartanburg. Was it relevant? The pleadings make no reference to the "Archer switch," or to any practice of the railroad thereat, or at any other point on its line. Great care has to be observed by the circuit judge to prevent the introduction of irrelevant ³⁷⁰ testimony, especially when objection is made to such testimony on that ground. The objection to this testimony was made, and we are unable to perceive any error in the ruling made by the circuit judge.

The second (third) ground of appeal relates to the circuit judge passing upon the matter of delivery, and its effects under the testimony in the case. While it may be admitted that a question of delivery is a mixed question of law and fact, yet there was no conflict of testimony here. Matters of law may be passed upon by the court. The circuit judge having discharged the legal functions of his high office in this matter, we see no error.

The third (fourth) ground of appeal seeks to hold that defendant, respondent, had possession of the thirteen bales of cotton at the time of the fire as a common carrier, and as the cotton was burned while in such car, that the circuit judge erred in granting the nonsuit. We do not know that our

views as to the propriety of nonsuit can be any better given than by quoting the language of this court in referring to this subject, as found in *Davis v. Columbia etc. R. R. Co.*, 21 S. C. 101: "When there is any competent, pertinent, and relevant testimony offered to the facts in dispute, the case passes into the hands of the jury and beyond the judge; but when no such testimony is offered, it is the province and duty of the judge to nonsuit. In the absence of all testimony in support of the material allegations in the complaint, which is a question for the judge, a nonsuit is proper; but when there is any testimony directed to said allegations, the weight, truth, and sufficiency of which are to be determined, the case must go to the jury."

Was there any testimony to be passed upon by the jury in this view of the case? Had not there been an absolute determination of the duty of the common carrier? He had transported the goods from the point of shipment to the place of delivery in perfect condition. The waybill had been delivered up as a receipt to the railroad company therefor. Not only were the goods receipted for, but actually received. To test this matter, suppose this cotton had been stolen from the car ³⁷¹ on the "Whitney switch," would the defendant, respondent, have been responsible therefor? No. Why? Because the cotton had been delivered, and in law was no longer the property of the common carrier as to third persons, but was the property of the plaintiff, appellant. There was absolutely no testimony that the defendant, respondent, had in any manner interfered with this property after such delivery, and, in the absence of all testimony to this effect, there was no issuable fact for the jury to try.

Nor are we able to perceive any force in the position, that if the relation of common carrier had ceased, that of warehouseman began, as is suggested in the fourth (fifth) ground of appeal. No testimony was adduced on this line, and, of course, then, there was no error. We cannot understand that the responsibility attaching to a warehouseman can be alleged when the property is placed in the charge of the true owner.

As to the fifth (fourth) ground of appeal, which alleges that as long as the cotton was in defendant's car it was in defendant's possession, and defendant was liable for loss by fire, we are unable to see how a kindness or privilege can be construed into a right. Take this illustration: A common carrier undertakes to deliver at a certain point in a city, and

does then actually deliver; but after such delivery the owner asks the privilege of allowing his goods to remain in the vehicle, and injury afterwards happens, there is no liability upon the common carrier if he does not interfere to cause that injury.

The sixth (seventh) ground of appeal suggests that if no liability existed as common carrier or warehouseman, still the question of destruction of cotton while on defendant's right of way by fire communicated by defendant's locomotive remained. It is admitted that section 1511 of our General Statutes is very sweeping, and would cover the case here, if there was any testimony, even the slightest, going to show that this fire was the result of sparks from the locomotive used by defendant, or was the act of any agent or employee of the railroad. But in the absence of any such testimony the circuit judge committed no error: *Brown v. Atlanta etc. Ry. Co.*, 19 S. C. 89.

²⁷² The seventh (eighth) is too general to merit further attention.

It is the judgment of this court, that the judgment of the circuit court be affirmed.

CARRIERS.—EFFECT OF USAGES ON THE MODE OF DELIVERY OF GOODS: See *Weyand v. Atchison etc. Ry. Co.*, 75 Iowa, 573; 9 Am. St. Rep. 504, and extended note at page 513; also *Pennsylvania R. R. Co. v. Stern*, 119 Pa. St. 24; 4 Am. St. Rep. 626, and note with the cases collected.

CARRIERS.—DELIVERY WHEN COMPLETE.—The liability of a railroad as a common carrier of freight ceases upon the unloading of the goods from the car at the place of destination and placing them in a secure warehouse; or if the carrier is not required in the usual course of business to unload the car, then by placing the car in a safe and convenient place for unloading it, or if no place of delivery is designated or required, then on its sidetrack in the usual and customary place for unloading by consignees: *Gregg v. Illinois Cent. R. R. Co.*, 147 Ill. 550, *ante*, p. 238, and note with the cases collected.

CARRIERS.—WHEN LIABLE AS WAREHOUSEMEN.—This question is discussed in the note to *Gregg v. Illinois Cent. R. R. Co.*, *ante*, p. 247, where the cases in this series will be found collected.

TRIAL.—NONSUIT.—WHEN SHOULD BE GRANTED.—If there is no evidence upon an issue before a jury, or the weight of evidence is so decidedly preponderating in favor of one side that a verdict contrary to it would be set aside, it is the duty of the trial judge to grant a nonsuit: *Linkauf v. Lombard*, 137 N. Y. 417; 33 Am. St. Rep. 743; *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804. A nonsuit should not be granted if there is substantial evidence produced by the plaintiff which should be weighed and considered by the jury: *O'Brien v. Miller*, 60 Conn. 214; 25 Am. St. Rep. 320, and note; *Carter v. Oliver Oil Co.*, 34 S. C. 211; 27 Am. St. Rep. 815, and note.

**MATTHEWS v. CHARLESTON AND SAVANNAH RAIL-
WAY COMPANY.**

[88 SOUTH CAROLINA, 429.]

CARRIERS—CONNECTING RAILROAD COMPANIES, LIABILITY OF, TO TICKET HOLDERS.—A railroad company is not liable in contract to a passenger traveling on a ticket issued by the agent of a connecting line, unless it is shown that the two companies are joint contractors, or that the company issuing the ticket had authority to bind the connecting company in respect to transportation over its line.

RAILROAD COMPANIES—REFUSAL TO STOP TRAIN AT STATION, WHEN NOT ACTIONABLE.—The refusal of a conductor to stop a train at a flag station, for the purpose of enabling a passenger holding a ticket for a point beyond to alight, is not an actionable breach of contract, unless it is the custom of the company to accommodate passengers in that manner. The mere fact that the ticket holder has, on previous occasions, been allowed to alight at the flag station does not render the company liable in such a case.

Action for refusal to stop a train at a flag station.

C. J. C. Hutson, for the appellant.

Z. A. Searson and A. M. Youmans, for the appellee.

420 McIVER, C. J. The question presented by this appeal is whether the circuit judge erred in refusing the motion to dismiss the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action:

The allegations of the complaint are substantially as follows: "That on or about the sixteenth day of August, 1891, the plaintiff was at Hampton, a station on the Port Royal and Augusta railway, from which tickets are sold to stations on the Charleston and Savannah railway, and bought a ticket to Hardeeville, a station on the said Charleston and Savannah railway, intending to get off said train at what is known as Ferebee's switch or Mews' crossing, a flag station on the said Charleston and Savannah railway, being informed that, under the rules of the said road, persons desiring to get off at flag stations were required to pay fare to next station beyond, and at which flag station, on previous occasions, plaintiff had taken the train and gotten off same, paying as aforesaid—said station being notoriously regarded and known as a flag station"; that when plaintiff presented her said ticket to the conductor of the Charleston and Savannah railway she informed him that she desired to get off at the flag station, where she had boarded the train when she left home, giving as her reason for wishing to get off at the flag station that her husband

would meet her there with a conveyance; that if he could not put her off at the flag station, she begged him to return the money which she had paid for passage between Ridgeland and Hardeeville; to which the conductor replied "that he would either carry her to Hardeeville or permit her to get off at Ridgeland, but could not put her off at the flag station named or return her money, as she requested"; that "plaintiff, preferring Ridgeland to Hardeeville, allowed herself put off there," from which point, with much inconvenience and suffering, she made her way home; "that by reason of the negligence and refusal of the agents and servants of the said Charleston and Savannah Railway Company to carry out the obligations of the said company, guaranteed as public carriers to the patrons of said railway company, and advertised by the past custom of said company, ⁴³¹ this plaintiff has been damaged in the sum of two thousand dollars."

It seems to us that these allegations are not sufficient to constitute a cause of action against the defendant company. In the first place, there is no allegation that these two railway companies were joint contractors, nor is it alleged that the Port Royal and Augusta Railway Company had any authority to bind it by issuing the ticket to the plaintiff, purporting to guarantee her safe transportation over the line of the defendant company, or imposing any obligation of any kind upon such company, for the mere allegation that the plaintiff bought a through ticket to Hardeeville was not sufficient for that purpose: *Felder v. Columbia etc. R. R. Co.*, 21 S. C. 35; 53 Am. Rep. 656.

But waiving this, inasmuch as the conductor of the defendant company seems to have recognized the ticket as entitling the plaintiff to transportation over the defendant's road as far as Hardeeville, it seems to us that there is another fatal defect in the allegations of the complaint. There is no allegation which even tends to show that the ticket which the plaintiff held entitled her to require the conductor to stop his train at the flag station, in order that plaintiff might get off the train at that point. Assuming that the Port Royal and Augusta Railway Company had a right to bind the defendant company by the ticket issued to the plaintiff, there is no pretense of any allegation that the contract embodied in that ticket was in any way violated by the defendant company. On the contrary, the complaint itself not only shows that the conductor, the agent of defendant, expressed his willingness

to carry the plaintiff to Hardeeville, the point indicated as her destination, thus complying fully with the contract, but it also shows that it was only at the express instance and request of the plaintiff that she was put off, or rather allowed the opportunity of leaving the train, at Ridgeland, a point short of her destination as expressed in her ticket. There is not even any allegation that it was the custom of the defendant company to stop its trains at the flag station for the purpose of enabling persons holding tickets for points beyond to get off at that station, ⁴³³ for surely the allegation that plaintiff had, on some previous occasion, been allowed to get on and off the train at the flag station did not amount to any allegation that it was the custom of the defendant so to do; and it is not alleged that there was anything in the ticket which she held, and which was the evidence of the contract under which she was being transported, that even indicated that she had a right to demand that the train should be stopped at the flag station to enable her to get off at that point.

It seems to us, therefore, that, as there was a total absence of any allegation of any breach of the contract under which she claimed the right to be transported, as well as of any allegation of any wrong done to the plaintiff, the complaint did not state facts sufficient to constitute a cause of action, and that the circuit judge erred in holding otherwise.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the complaint be dismissed.

CONNECTING CARRIERS—LIABILITY OF.—The sale of a through ticket over two connecting roads is not evidence of a joint contract by which the second is liable for the loss of baggage by the first: *Felder v. Columbia etc. R. R. Co.*, 21 S. C. 35; 53 Am. Rep. 656. A passenger by railway purchasing a ticket over the line of the seller and connecting lines, and injured by the negligence of one of such connecting lines, cannot maintain an action therefor against the seller: *Nashville etc. R. R. Co. v. Sprayberry*, 8 Baxt. 341; 35 Am. Rep. 706. A connecting carrier receiving property for transportation from the first carrier, the original contract contemplating such employment, is liable directly to the shipper for his negligence: *Halliday v. St. Louis etc. Ry. Co.*, 74 Mo. 159; 41 Am. Rep. 309, and note. A carrier who sells tickets to a place beyond his line in pursuance of an agreement between him and the connecting lines is liable for damages to passengers through the fault of a connecting line: *Carter v. Peck*, 4 Sneed, 203; 67 Am. Dec. 604. A carrier receiving freight for shipment beyond its own line is not liable for losses occurring on an independent connecting line, unless it has contracted to carry the goods to their destination: *Illinois Cent. R. R. Co. v. Kerr*, 68 Miss. 14. In the absence of a partnership to bind one another, carriers over

whose lines freight is to pass are but agencies employed by the contracting carrier receiving the freight for through shipment upon such lines: *Fort Worth etc. Ry. Co. v. Williams*, 77 Tex. 121. See the notes to the following cases: *Fitchburg etc. R. R. Co. v. Hanna*, 66 Am. Dec. 430; *Ladue v. Griffith*, 82 Am. Dec. 363; *Sprague v. Smith*, 70 Am. Dec. 428; *Peninsular R. R. Co. v. Gary*, 1 Am. St. Rep. 200, and the extended notes to *Wells v. Thomas*, 72 Am. Dec. 230; *Gray v. Jackson*, 12 Am. Rep. 40; *Lawrence v. Winona etc. R. R. Co.*, 2 Am. Rep. 141; *Hadd v. United States etc. Express Co.*, 36 Am. Rep. 761; *Hill v. Syracuse etc. R. R. Co.*, 29 Am. Rep. 166.

RAILROADS—REFUSAL TO STOP TRAIN AT STATION.—A railroad company may adopt a regulation that a certain train shall not stop at designated stations, where there is no statutory provision to the contrary: *Atchison etc. R. R. Co. v. Gants*, 38 Kan. 608; 5 Am. St. Rep. 780, and note; *Ohio etc. Ry. Co. v. Swarthout*, 67 Ind. 567, 33 Am. Rep. 104.

CHARLESTON v. WERNER.

[38 SOUTH CAROLINA, 428.]

MUNICIPAL CORPORATIONS—VALIDITY OF ORDINANCES—POLICE POWER.—

The validity of an ordinance requiring the owner of a lot, which has been declared to be dangerous to the public health, to fill it up to a certain level at his own expense, and in the event of his refusing or neglecting to obey the direction, empowering the city to do the work and recover the expense thereof from him, if it does not amount to more than one-half the value of the lot, is to be determined by the principles by which the lawfulness of the exercise of the police power is tested, and not by those which are applicable to local taxes levied for the purpose of making improvements.

CONSTITUTIONAL LAW—POLICE POWER—SANITARY LEGISLATION.—The state may enact laws for the preservation of the public health, even at the expense of private rights, and may delegate that power to municipalities. Hence a statute is not unconstitutional which empowers a city council, whenever it shall be of opinion that any lots or grounds within the city are in such a condition or so situated as to be dangerous to the public health, to direct the proprietors of such lots or grounds to fill them up to a given level, and also authorizes the council, in case those proprietors refuse or neglect to comply with such direction, to do the work, and recover the expense thereof from them, provided the amount does not exceed half the value of the land so filled.

THE two sections of the ordinance by virtue of which this action was brought are as follows:

SEC. 227. Whenever it shall appear to the board of health that any low lots or vacant grounds are in a condition to injure or endanger the public health, it shall be the duty of the said board of health to appoint a board of inspection, to be composed of the city registrar and four members of the board of health (any three of whom shall be a quorum), whose duty

it shall be to enter upon and thoroughly examine such lots or vacant grounds, and determine by the vote of not less than three of the said board whether such lots or vacant grounds shall be drained, filled up, leveled, or otherwise so improved as to remove the nuisance and evil there complained of or existing. And should the said board of inspection be of opinion that such lots or vacant grounds ought to be filled up, leveled, or drained, they shall submit a detailed report to the city council setting forth the actual condition thereof, and suggesting the mode, materials, and extent to which such low lots or vacant grounds shall be filled up, leveled, or drained; upon which report council shall take such order and direction thereon as they may deem expedient.

SEC. 228. In case council shall order the report of said board of inspection, made as aforesaid, to be carried into effect, or shall direct such low lots to be filled up, leveled, or drained, it shall be the duty of the city registrar to serve a notice in writing on the owner or owners of such low lots or vacant grounds, directing said owner or owners to have such lots or vacant grounds filled up, leveled, or drained, as council may require, to such extent, in such manner, with such materials, and within such reasonable time as may be prescribed by the said order of the city council. And in case of neglect or refusal of such owner or owners to obey said notice it shall be the duty of the city registrar to cause such lots or grounds to be filled up, leveled, or drained, in the manner prescribed in the said notice, under the order and direction of the said board of inspection. The expenses and charges paid and incurred in case such lots or grounds shall be filled up, leveled, or drained, under the order of the board of inspection, shall be paid in the first instance out of the city treasury, and shall afterwards be recovered, with interest and costs of suit, in an action of debt, to be brought by council in the court of common pleas, against the owner or owners of such lots or grounds. The city engineer shall, whenever required, attend the said board of inspection on the examination of low lots and grounds, and under their direction make plans for filling, leveling, and draining the same.

Mordecai and Gadsden, for the appellant.

Charles Inglesby, for the appellee.

491 McGOWAN, J. This is an action by the city council of Charleston to recover from the defendant, Doris Werner, the

amount paid by the city council for filling up a low lot in the city, the property of the said defendant, which said lot, or a portion thereof, had been inspected by the "board of health," determined to be a nuisance dangerous to the public health, and ordered to be filled. The defendant having been notified, as required by law, to fill the said lot, and having failed so to do, the same was filled by the city authorities, and the present action is for the recovery of the cost of the said filling, viz., for fifteen hundred and three cubic yards of earth at an expense of eleven hundred and fifty-seven dollars and ten cents, which has been paid out of the city treasury. The plaintiff alleges that no part thereof has been paid by the said defendant, and that said sum does not exceed "one-half the value of defendant's ⁴⁰² said lot of land." Whereupon plaintiff demands judgment against the said defendant for the said sum of eleven hundred and fifty-seven dollars and ten cents, with interest and costs.

When the complaint was read, the defendant, by her counsel, interposed a verbal demurrer, and moved to dismiss the complaint, for the reason that it did not state facts sufficient to constitute a cause of action. His honor, Judge Kershaw, overruled the demurrer, and the defendant appeals to this court upon the following exceptions (the complaint in full should appear in the case): 1. Because sections 227 and 228 of the revised ordinances of the city of Charleston (September 26, 1882) are in violation of the fifth amendment to the constitution of the United States, as well as section 23, article 1, of the constitution of South Carolina, because said sections authorize a personal judgment against the defendant as the alleged owner of the lot described in the complaint, etc. 2. Because the act of the general assembly of the state of South Carolina, "To authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for other purposes," etc. (December 18, 1830), as well as the act to amend the same (December 19, 1883), and each and both, are in violation of, and in contravention to, the fifth amendment to the constitution of the United States, as well as section 23 of article 1 of the constitution of the state of South Carolina. 3. Because the oral demurrer should have been sustained, in that it appears upon the face of the complaint, that the cost of the alleged improvement was not apportioned among all the property owners of the special taxing district, and that there was no system

of apportionment whatever. 4. Because the said sections of the revised ordinances of the city of Charleston are *ultra vires* and void, in that no provision is made in said sections for condemning the land, should the cost of the proposed improvement exceed one-half of the value of the land.

There seems to be some misapprehension as to the nature and object of this proceeding. Reference is made to the "alleged improvement" and "the apportionment of the costs among all the property owners of the special taxing district." This clearly refers to the principles applicable ⁴⁰³ to a local tax, for the purpose of making improvements, such as paving a street or opening one. But as we understand it, this is not a matter of taxation at all, either general or local.

The object of this proceeding is not to raise money to support the city government, or to improve the value of property in a particular locality (which may, however, be incidentally the result), but to put in operation the police power granted to the city council, for the purpose of preserving the health of the city. It is the machinery provided for enforcing the law against nuisances which menace the health of the public. "A law which might be invalid as an exercise of the right to tax for revenue, might be sustainable where its purpose was the promotion of the general public health or morals. In exercising the power of taxation, no discriminations are to be made; while in the exercise of police power, the state is ordinarily to be governed only by considerations of what is for the public welfare": 18 Am. & Eng. Ency. of Law, 544, and notes. We must not, therefore, confound an exercise of the police power with the nice distinctions which belong to the doctrine of taxation for local improvements.

In 1793, the city council of Charleston was incorporated with the usual police powers: 7 Stats, 97. In 1830 the charter was amended, giving expressly the following police powers: "That whenever the city council of Charleston shall be of opinion that any lots or grounds within the city, belonging to any person or persons, etc., are in a state of nuisance, or so situated that in warm or unhealthy seasons a nuisance may thereby be created, and the health of the city endangered; or whenever the land or streets in the vicinity of said lots may become liable to injury therefrom, the city council, etc., shall have full power and authority to cause a notice to be served on the owner of such lots or grounds, directing him or them to have the same filled up to such extent, in such manner,

with such materials, and within such reasonable time, as may be prescribed in such notice; and in case the owner of such lot shall neglect or refuse to fill up said lots, that the said city council are hereby authorized and empowered to have such lots filled up, etc. 2. All expenses or charges paid or incurred by the ⁴⁹⁴ said council, in case such lots shall be filled up under their authority, shall and may be recovered in an action of debt against the owner or owners of such lots or grounds; provided the said expenses and charges do not exceed more than half the value of said lots or grounds," etc. In 1839 the city council passed an ordinance containing two sections, in conformity with the above act, which in 1882 were re-enacted in the revised ordinances as sections 227 and 228. In 1883 the general assembly again amended the charter by adding the following words: "*Provided, however,* that if the estimated expenses and charges of filling said lots shall exceed more than one-half the value thereof, then, and in that event, the said city council shall have power and authority to condemn the said lots, and upon paying to the owner or owners the price that may be fixed therefor, as hereinafter provided, the title thereof shall vest in the said city council of Charleston," etc.

It will be observed that the complaint recites sections 227 and 228 of the revised ordinances of the city, which are in exact conformity to the terms of the act of 1830; and if that act is constitutional, it is difficult to see the point made by the last ground of appeal, that "the said sections of the revised ordinances are *ultra vires* and void, in that no provision is made in said sections of said ordinances for condemning the land, should the cost of the proposed 'improvement' exceed one-half of the value of the land," etc. The right to condemn the land and pay for it is mentioned for the first time in the amendment of 1883, which was long after the said sections of the ordinances were passed, and that right—to condemn—was given only in the event that the charge of filling the lots "shall exceed more than one-half the value thereof." This was not a case falling in that category, for the complaint alleged distinctly "that the said sum of eleven hundred and fifty-seven dollars and ten cents does not exceed one-half the value of defendant's lot of land," etc. The oral demurrer, for the purposes of the issue made by it, admitted that fact, and therefore it was not necessary to make

that point under the amendment of 1883, which did not cover the case, and the matter stood precisely as if that act had never been passed. ⁴⁹⁵ As urged for the plaintiff: "In the amendment of 1883, we have no express provision for, but an unmistakable exclusion of, such a case as the present."

Then the only question in the case is whether the act of 1830, amending the charter of the city council of Charleston, is constitutional or not. The state, through the law-making body, certainly possesses the police power, which, from its very nature, has no well-defined limits, but must be as extensive as the necessities which call for its exercise. Although not clearly defined, it is an extensive power, distinguished not only from the power of taxation, but also from that of eminent domain, and in its widest sense is said to be the general power of a government to preserve and promote the general welfare, even at the expense of private rights. "It is difficult, if not impossible, to define the exact scope of the term. The supreme court of the United States have declined to do so, stating that they would only determine each case as it arose": *Stone v. Mississippi*, 101 U. S. 814, and 18 Am. & Eng. Ency. of Law, 740, and notes.

The title of the act in question was, "To authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston, in certain cases," etc. Its whole and exclusive purpose was to promote and secure the health of the city of Charleston; and it would be difficult to conceive of a clearer case of the exercise of police power. "Health being the *sine qua non* of all personal enjoyment, it is not only the right, but the duty, of a state to pass such laws as may be necessary for the preservation of the health of the people. For this purpose a state may compel the clearing and drainage of lands, which might otherwise create malaria or other diseases; or provide in any other reasonable way for the preservation of the public health," etc.: See *City Council v. Baptist Church*, 4 Strob. 307; *Columbia etc. R. R. Co. v. Gibbes*, 24 S. C. 60; *Town Council v. Pressley*, 33 S. C. 56; 26 Am. St. Rep. 659; 18 Am. & Eng. Ency. of Law, 750, and notes. We have no doubt that the amending act of 1830 was constitutional, and that the general assembly had the right to delegate the police power to the city council of Charleston.

⁴⁹⁶ The judgment of this court is that the judgment of the circuit court be affirmed.

MUNICIPAL CORPORATIONS—POLICE POWER.—The legislature may, in the interest of public health, vest in municipal corporations the power to pass ordinances requiring either the filling up or draining of excavations upon lands within the corporate limits which are filled with foul and stagnant water: *Rochester v. Simpson*, 134 N. Y. 414. A city ordinance requiring the owners of lots on streets which have been graded and paved to pave the sidewalks adjoining their lots is valid, and if the owners do not comply, the city may do the work, and collect the expense from the owners: *Sands v. Richmond*, 31 Gratt. 571; 31 Am. Rep. 742; *Mayor v. Mayberry*, 6 Hamph. 368; 44 Am. Dec. 315, and note.

CONSTITUTIONAL LAW—POLICE POWER.—The police power of a state extends to all regulations affecting the lives, limbs, health, comfort, good order, peace, good morals, and safety of society: *State v. Heinemann*, 80 Wis. 253; 27 Am. St. Rep. 34, and note; *Crawfordsville v. Bruden*, 130 Ind. 149; 30 Am. St. Rep. 214; *Town Council v. Pressley*, 33 S. C. 56; 26 Am. St. Rep. 659. The police power of the state is the authority vested in the legislature to enact all such wholesome laws, not in conflict with the state or federal constitution, as they may deem conducive to the public good: *State v. Moore*, 104 N. C. 714; 17 Am. St. Rep. 696, and note; *People v. Budd*, 117 N. Y. 1; 15 Am. St. Rep. 461, and note; *New Orleans Gas etc. Co. v. Hart*, 40 La. Ann. 474; 8 Am. St. Rep. 544. See, also, the note to *People v. Wagner*, 24 Am. St. Rep. 145, and the extended note to *Commonwealth v. Kimball*, 35 Am. Dec. 334.

JACKSON v. PLYLER.

[38 SOUTH CAROLINA, 496.]

FRAUDULENT CONVEYANCES—RIGHTS OF SUBSEQUENT CREDITORS.—An existing creditor may assail a voluntary deed, even though executed without any evil intent or fraudulent purpose whatsoever; but such a deed will not be declared void at the instance of a subsequent creditor, unless it was made with a view to future indebtedness, or attended with some other circumstance of actual fraud.

FRAUDULENT CONVEYANCES—EVIDENCE SUFFICIENT TO SHOW FRAUD.—A finding by a referee and a trial judge that a conveyance of land to the grantor's wife was fraudulent is sufficiently sustained by testimony showing that the grantor, if not insolvent at the time of the conveyance, became so not long afterwards; that he executed the deed with the avowed purpose of securing a home for his family if "something were to turn up"; that he went on getting deeper and deeper into debt, finally landing in utter insolvency; and that he subsequently mortgaged the land conveyed without giving the mortgagee any notice of the conveyance.

LIMITATIONS OF ACTIONS—FORMAL PLEA OF THE STATUTE, WHEN NOT NECESSARY.—The statute of limitations is available as a defense without a formal plea thereof, if the nature of the proceeding is such that the statute cannot be interposed directly as a bar to the plaintiff's right of action, and is relied upon merely as precluding the plaintiff from assailing, on the ground of fraud, an instrument offered in evidence by the defendant.

LIMITATIONS OF ACTIONS FOR RELIEF ON THE GROUND OF FRAUD, WHEN INAPPLICABLE.—A statute limiting the period within which "actions for relief on the ground of fraud" must be commenced will not preclude a mortgagee from showing, in a foreclosure suit instituted after the lapse of that period, that a prior deed under which the defendant seeks to make title was fraudulent as to the subsequent creditors of the grantor.

E. J. Kennedy, for the appellant.

Price and Stevenson, for the appellee.

497 **McIVER, C. J.**—This was an action to foreclose a mortgage of real estate, executed on the 12th of February, 1879, by one James Robertson to the plaintiff. The mortgagor, James Robertson, having departed this life intestate some time in the year 1882, and his widow, Sarah A., having subsequently intermarried with one William B. Plyler, the action is against her and her children as heirs at law of the mortgagor, with whom is joined one Peter L. Threatt, who is in possession of, and claims title to, ten acres of the land covered by the mortgage; and his claim having been allowed by the circuit decree, which is not appealed from as to that claim, the only controversy here is as to the defense set up by the appellant, Sarah A. Plyler. Her defense is title to the mortgaged premises, paramount to the mortgage, derived under a deed to her from her former husband, James Robertson, executed on the 14th of November, 1877, and duly recorded on the 8th of December, 1877, prior to the execution of the mortgage. To this plaintiff replied that said deed was fraudulent and void, and appellant rejoins that plaintiff is barred by the statute of limitations from assailing said deed for fraud.

The case was referred to a referee to determine all the issues both of law and fact, and he made his report, finding, amongst other things, as matter of fact, that the deed from James Robertson to his wife, the appellant, was without consideration, and was made with a fraudulent intent, and, as a matter of law, that said deed was null and void, and, therefore, constituted no defense to this action; and as he overruled the defense of the statute of limitations, he recommended that the plaintiff have judgment of foreclosure, except as to the ten acres claimed by the defendant, Peter L. Threatt. To this report the appellant filed numerous exceptions, all of which were overruled by the circuit judge, who rendered judgment for foreclosure as recommended by the referee.

From this judgment the defendant, Sarah A. Plyler, appeals

upon the several grounds set out in the record, which need not be repeated here, as they make substantially only the following questions: 1. Whether the deed from James Robertson to the ⁴⁰⁰ appellant was void for fraud; 2. Whether the plaintiff was barred by the statute of limitations from assailing said deed, upon the ground of fraud, in this action; 3. Whether the appellant could obtain the benefit of the statute, without formally pleading the same.

The fact that the deed in question was voluntary does not seem to have been seriously contested; and in view of the concurrent finding of the referee and the circuit judge, it could not well be, as there certainly was some evidence to sustain that conclusion, and none to show that it was based upon any valuable consideration. Assuming that to be an established fact, we come to the consideration of the first question above stated. While it is unquestionably true that the mere fact that a deed is without consideration—a voluntary deed—will not render it fraudulent as to subsequent creditors, especially where they have notice, yet, if, in addition to its being voluntary, it was made with a view to future indebtedness, or attended with some circumstance of fraud other than what arises from its being voluntary, then it may be declared null and void for fraud, even at the instance of subsequent creditors. While, therefore, an existing creditor may assail a voluntary deed, even though executed without any evil intent or fraudulent purpose whatsoever, and even if the motive which prompted the act should be of the most praiseworthy character, yet a subsequent creditor is not permitted to do so, without showing some actual moral fraud. As authority for these doctrines, we do not deem it necessary to go behind the case of *Walker v. Bollmann*, 22 S. C. 512, where the late Chief Justice Simpson clearly lays down these principles, and sustains them by citations of the authorities.

Inasmuch, therefore, as the plaintiff in this case is conceded to be a subsequent, and not an existing, creditor, it is necessary to inquire whether there was any actual fraud in the deed which was assailed. This is a question of fact; and in view of the well-settled rule, we are bound to sustain the concurring judgment of the referee and circuit judge, unless it is without any testimony to sustain it, or is ⁴⁰⁰ contrary to the manifest weight of the testimony. This we certainly cannot say, in view of the testimony set out in the "case."

Without undertaking to go into any extended discussion of

the testimony, it is sufficient to say, that it shows the case of a man who, if not insolvent at the time, became so not long afterwards, makes a voluntary deed to his wife of a considerable part of his property, with the declared purpose "that he wanted to make it to his wife, as it did not make any difference then what turned up, his wife and children would have a home," showing that he expected something to turn up in the way of financial disaster; that this expectation was not without foundation, as he was very soon afterwards sued, and that he continued to go deeper and deeper into debt, finally landing in utter insolvency; and when to this is added the fact, which, standing alone, would amount to nothing, that he, very soon after making this voluntary deed, showed himself to be a person capable of committing a gross fraud, by mortgaging to the plaintiff the very same land which he pretended to have conveyed to his wife, without giving his mortgagee any notice of such conveyance. So that, without considering the testimony as to the grantor's indebtedness to B. A. Evans, who seems to have been an existing creditor at the time the deed in question was executed, which indebtedness was subsequently largely increased, and some of it yet remains unpaid, we think there is quite sufficient evidence to sustain the concurring judgment of the referee and circuit judge, that there was actual fraud in the deed.

It only remains, therefore, to consider the matter of the statute of limitations. We agree with the counsel for appellant, that the fact that the statute was not formally pleaded does not preclude the appellant from relying upon the statute, for the reason that we do not see where such a plea could have been formally interposed. The appellant does not, and could not, rely upon the statute as a bar to the plaintiff's right of action, in which case a formal plea would have been necessary; but the statute is relied upon as precluding the plaintiff from assailing the deed which the appellant has offered in evidence to sustain her defense. The ⁵⁰⁰ appellant was not bound to assume that the plaintiff intended to assail her deed for fraud, and could not know of such intention until after the deed was offered in evidence; and as the pleadings must be made up before any evidence is offered, we are unable to see at what point appellant could have interposed the statute by a formal plea. Possibly the better practice in such a case would be for the party relying upon the deed to object

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to any evidence tending to assail the deed for fraud, upon the ground that such assault is barred by the statute of limitations; but no such question has been raised in this case, and, therefore, this court must not be regarded as deciding it. It seems to us, therefore, that the appellant was not precluded from relying upon the statute (if applicable at all), by the fact that it was not formally pleaded.

But we are of opinion that the statute of limitations is not applicable to the case. This is not an "action for relief on the ground of fraud," but, on the contrary, it is simply an action for the foreclosure of a mortgage of real estate, and the plea of the statute does not, and cannot, have any applicability to anything but the cause of action as stated in the complaint. It is purely an arbitrary defense, resting solely upon the terms of the statute creating it, and has no application to the merits of the controversy. Reading that statute in connection, as found in section 94 of the code, together with section 112, subdivision 6, it would read in this way: "Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued," to wit: "Any action for relief on the ground of fraud" must be commenced "within six years" after the cause of action has accrued, which shall "not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." Now, it is difficult to conceive how this purely statutory defense is applicable to the present case, which is undoubtedly not such an action as that in which the defense of the statute is permitted and provided for. As was said in *Amaker v. New*, 33 S. C. 35: "The plea of the statute, as it is called (improperly, as I think, for such a plea must be directed to the cause of action set forth in the complaint), ²⁰¹ is not directed to the plaintiff's cause of action, but is interposed as a protection against an attack made by the plaintiff upon the defense set up by defendants."

The plaintiff here having established his cause of action, as set forth in his complaint, by proving the execution of the note and mortgage, was entitled to judgment of foreclosure, unless the appellant succeeded in establishing her title paramount to the mortgage. For this purpose she relied upon the deed in question, and, therefore, the only remaining question was whether such deed was sufficient to vest the title in her; and surely the plaintiff was at liberty to show any defect in that deed which would render it insufficient to vest such

title in appellant, either by showing that it was a forgery, or that it was obtained by duress or any other fatal defect; and if so, why should not the plaintiff be allowed to show that it was void for fraud, and, therefore, incapable of vesting the title in appellant, and thus insufficient to sustain the defense relied on. It must be remembered that the statute of limitations does not even purport to destroy or extinguish a cause of action, but simply to close the doors of the courts to a suitor who undertakes to bring his suit upon such cause of action after the lapse of the prescribed time. Hence it has been held in *Wilson v. Kelly*, 16 S. C. 216, that while a holder of a note may have lost his right of action for the breach of the contract evidenced by the note, by reason of the lapse of the prescribed time, yet if he can obtain payment in any other way than by resort to an action on such contract, he has the right so to do. So here the statute does not have the effect of converting a fraudulent deed into a valid deed, by reason of the lapse of the prescribed time, but it simply forbids the right of action for relief on the ground of fraud; and hence, if the question as to the fraudulency of the deed arises in any other way than in such an action, there is nothing in the statute which forbids its being assailed for fraud. It seems to us that the case of *Amaker v. New*, 33 S. C. 85, is so entirely conclusive of this question that we need not consider it further.

The judgment of this court is, that the judgment of the circuit court be affirmed.

FRAUDULENT CONVEYANCES—RIGHT OF SUBSEQUENT CREDITORS TO ATTACK.—A voluntary conveyance is not, as against subsequent creditors, fraudulent nor void, though the grantor was indebted at the time it was executed. To make it fraudulent proof of actual or intentional fraud is necessary: *Rudy v. Austin*, 56 Ark. 73; 35 Am. St. Rep. 85, and note; *Fullington v. Northwestern Importers' etc. Assn.*, 48 Minn. 490; 31 Am. St. Rep. 663, and note. See further the extended notes to *Hagerman v. Buchanan*, 14 Am. St. Rep. 750; and *Jenkins v. Clement*, 14 Am. Dec. 706, where the question is fully treated.

LIMITATIONS OF ACTIONS—PLEADING.—The statute of limitations to be available as a defense must be specially pleaded: *Hunt v. Hayt*, 10 Col. 278; *Albertson v. Terry*, 109 N. C. 8; *Seborn v. Beckwith*, 30 W. Va. 774; *Guthrie v. Bacon*, 107 N. C. 337; *Orr v. Rode*, 101 Mo. 387; *Curtis v. Alina Li's Ins. Co.*, 90 Cal. 245; 25 Am. St. Rep. 114; *Johnson v. Cooper*, 2 Yerg. 524; 24 Am. Dec. 502; *Parker v. Kane*, 4 Wis. 1; 65 Am. Dec. 283, and note; *Wilkinson v. Flowers*, 37 Miss. 579; 75 Am. Dec. 78, and note.

CASES
IN THE
COURT OF CRIMINAL APPEALS
OF
TEXAS.

LAUDERDALE v. STATE.

[31 TEXAS CRIMINAL REPORTS, 48.]

EVIDENCE—CONFESSIONS—ADMISSIBILITY OF.—To authorize a confession of guilt made with an agreement to turn state's evidence to be admitted on the subsequent trial of the party making it, it must appear not only that it was made freely and without compulsion or persuasion, but if the defendant was under arrest, in jail, or other place of confinement it must be further shown that the confession was made voluntarily after he had been first cautioned that it might be used against him. If the party, after being so cautioned, has been threatened or persuaded into making it, in the hope that he will be permitted to turn state's evidence and thereby gain immunity from punishment, in no event can the confession so obtained be used against him if he subsequently repudiates the agreement, and refuses to testify as a witness for the state.

R. H. Harrison, assistant attorney general, for the state.

47 **HURT, J.** Appellant stands convicted of arson, as an accomplice, his punishment being assessed at five years in the penitentiary.

It appears from the record that Wade and others were also indicted and convicted for this offense; that appellant refused, upon the trial of Wade, to testify for the state, because his evidence would criminate himself. It also appears that appellant had testified for the state on the examining trial, his evidence being conclusive of his own guilt. Under the following circumstances, the testimony taken before the examining court, over his objection, was introduced in evidence against him in this case: On the trial of said cause, on the preliminary hearing of evidence on the admissibility of the confes-

sion of the defendant, Tom Lauderdale, the following facts were proven, to wit:

W. J. OXFORD testified as follows:

"At the time of the alleged burning I was county attorney of Earth county, Texas, and went from Stephenville to Dublin, Texas, in order to investigate said burning, and attend the examining trial of the parties charged with its commission. Wade came to me, and stated that he was going to turn state's evidence, if Tom Lauderdale did n't, and that he had no family, and that Tom Lauderdale had a large family, and for that reason ^{as} he wanted to give Lauderdale an opportunity of testifying, and so escape punishment. After this, and on the evening before the defendant testified on the examining trial, myself, Bishop, Wade, and W. J. Davies went to Lauderdale's house to see him on the matter of getting him to turn state's evidence instead of Wade. When we got to defendant's house and mentioned this subject to him, he (defendant) said he did not want to get tangled. I told him that, if he would testify for the state through all courts, I would see that he should not be prosecuted, and upon this assurance he agreed to turn state's evidence.

"The next morning when the examining court convened, at the city hall in Dublin, and just before defendant testified, I saw him (defendant) in attendance, and I said to him 'Well, you are here;' to which he replied, 'Yes, I am here, and ready to go through.' I then again said to him, that if he would testify for the state through all courts, he should not be prosecuted; but that if he testified, and refused to do so through all the courts, his testimony might be used against him. Immediately after this he was called in and testified. I do not recollect that I used the words 'through all the courts.' I cannot swear that I used these identical words in the conversation spoken of, or that I spoke of the final trial in the district court; but I was there for the purpose of preparing the case for the final trial in the district court, and I think I used the words substantially as I have stated.

"The defendant, at the succeeding term of the district court, was indicted and arrested, and put in jail. He was in jail from Friday or Saturday of one week to Tuesday of the next, when he gave bond. After getting out of jail, on bond, he came into my office and complained of having been indicted, when I assured him that he should [not?] be punished, and remarked to him, 'If you go on and testify, when

you go to the penitentiary I will go necked to you.' On the trial of Tom Wright, defendant was sworn as a witness for the state, but refused to testify, on the ground that his testimony would criminate himself, but he never assigned as a reason for so doing that he had been indicted."

J. E. BISHOP testified as follows:

"I was city marshal of Dublin at the time of the alleged burning. Mr. Oxford, Wade, W. J. Davies, and myself went to the defendant's house the evening before he testified in the examining court in Dublin, to see him about turning state's evidence. At Mr. Oxford's request, I went to see the defendant first. I had a warrant for his arrest, and so informed him, and showed him the warrant. Defendant was lying on the bed, sick, at the time. I told the defendant that Wade would testify if he did not, but that he would give him the first chance to do so. He at first declined, but I insisted on his doing so, and told him to tell all he knew, and save himself; and he finally consented to turn state's evidence, provided he could benefit himself by so doing. I went out, and so informed Mr. Oxford, and he (Oxford), ⁴⁸ Wade, Davies, and myself went in together. Wade told the defendant that he proposed to testify, and informed him (defendant) that he might take his place, and have the benefit of turning state's evidence, if he desired to do so. Mr. Oxford then told the defendant that if he would testify for the state, and corroborate Tom Wright, he (Oxford) would see that defendant should not be prosecuted. I did not hear the district court mentioned, except that the defendant would not be prosecuted in the district court. I did not hear Mr. Oxford tell the defendant that if he refused to testify, or went back on his agreement, his testimony might be used against him. I did hear Oxford tell the defendant, as many as three times, that if he would testify he would not be prosecuted. I did not take bond from the defendant, but, after the agreement was made, myself and Davies stood good for his appearance."

W. J. DAVIES testified as follows:

"I was present at defendant's house when the agreement was made for him to testify. I had myself negotiated the whole affair. I made the agreement with Wade to testify, and the agreement with defendant was sanctioning what I had agreed with Wade. Mr. Oxford had agreed with defendant that he would not prosecute him if he (defendant) would turn state's evidence. I heard nothing said about testifying

through all courts, or that if he refused to testify through all courts he would be prosecuted. My understanding was, however, that the defendant would testify for the state in all the courts, though I do not remember that this was mentioned."

J. H. McMILLAN testified as follows:

"I was at the examining trial of the parties charged with the alleged burning, and was attorney for some of the defendants. I was present when the defendant, Tom Lauderdale, was offered as a witness for the state. In explanation of why he offered him, the county attorney (Mr. Oxford) stated, in open court, that he had made an agreement with the defendant that if defendant would testify for the state he (defendant) would not be prosecuted. I heard nothing about how far or through what courts defendant was to testify. At the time he testified neither the court nor the county attorney, nor any other person, cautioned the defendant that his testimony might be used against him."

W. J. OXFORD, recalled, testified:

"I have no recollection of making the statement referred to by Mr. McMillan. I may have done so. It looks reasonable that I would have made some explanation."

Thereupon the district attorney offered in evidence the testimony of the defendant taken on the examining trial, to which defendant objected, because: 1. The defendant was under arrest at the time, and no caution was given as the law requires. 2. The evidence shows that the defendant was suspected of, and charged with, the alleged burning at the time his said testimony was taken. 3. The testimony was given under a distinct ⁵⁰ agreement with the proper officer that the defendant should not be prosecuted, and was in no sense a voluntary confession. The promise of reward having been given as an inducement to the defendant to so testify, the evidence shows clearly that such testimony was given under the influence of such promise, and there is nothing to show that such influence had been removed, or that the *status* of the defendant had undergone any change (with respect to his turning state's evidence) since the promise was made—all of which objections were by the court overruled, and the district attorney, over such objections, was permitted to read said testimony to the jury, to all of which ruling and action of the court defendant, by counsel, then and there excepted. The testimony read to the jury is fully set forth in the paper

hereto annexed, marked "Exhibit A," and made part hereof, and defendant tenders this, his bill of exceptions, and prays that the same may be allowed, and made a part of the record of this case.

The evidence in the deposition taken before the examining court contains confessions of facts which establish the guilt of the defendant.

At common law these confessions thus made were admissible against the accused upon breach of the agreement to testify: 1 Greenleaf on Evidence, sec. 379; 1 Bishop's Criminal Procedure, 3d ed., sec. 1164; 3 Russell on Crimes, 5 Eng. ed. 601; *Hamilton v. People*, 29 Mich. 173; *Commonwealth v. Knapp*, 10 Pick. 477; 20 Am. Dec. 534.

Is this the rule in this state? Does our statute differ from the common-law rule? It does. See this proposition, we think, demonstrated by Presiding Judge White, in the case of *Lopez v. State*, 12 Tex. App. 27. He says: "No exceptions to the statute relating to confessions, save those enumerated, can with us be availed of by the state. 'The confession of a defendant may be used in evidence against him if it appear that the same was freely made, without compulsion or persuasion, under the rules hereafter prescribed': Code Crim. Proc., art. 749. 'The confession shall not be used if at the time it was made the defendant was in jail or other place of confinement, nor while he is in custody of an officer, unless such confession is made in the voluntary statement of the accused taken before an examining court in accordance with law, or be made voluntarily, after having been first cautioned that it may be used against him,' etc.: Art. 750. To authorize such confession or confessions, made with an agreement to turn state's evidence, to be admitted on the subsequent trial of the party making them in this state and under this statute, it should be made to appear not only that they were made freely and without compulsion or persuasion, but if the defendant was under arrest, in jail, or other place of confinement, it would have to be further shown that they were made voluntarily, after he had been first cautioned that they might be used against him. But the confession can in no case be used 'unless freely made, without compulsion or persuasion.' If the party has been threatened into making, or persuaded into ⁵¹ making, it, in the hope that he would be permitted to turn state's evidence, and thereby gain immunity from punishment, in no event could such confession be used against

him, if he subsequently repudiated the agreement, and refused to testify as a witness for the state."

But the learned trial judge based his ruling upon the fact that the county attorney cautioned appellant that if he failed to testify, his confessions would be used against him. We answer, first, was this the rule required by the statute? The rule required by the statute is "or be made voluntarily, after having been cautioned that it may be used against him." The caution given was, "May be used against him if he failed to testify." The caution given contained a condition that was not required by the statute. (This by the way.)

But, concede that appellant was properly cautioned, will this fact, under the circumstances attending this question, alter the rule? It will not. For, whether cautioned or not, the confession must be voluntary. The confession must be freely made, without persuasion, though conditioned. This rule is most clearly established in *Lopez v. State*, 12 Tex. App. 27. Were the confessions in this case freely made—made without persuasion? They were not. See the evidence bearing upon this question. The county attorney, Bishop, the city marshal, and others went to the house of appellant, and mentioned the subject to him. Appellant at first refused, but the marshal insisted on his doing so, and he finally concluded to make the confession. The appellant, without any question of doubt, was persuaded to make the confessions. This being the case, whether cautioned or not, or whether he kept or violated his contract, his confessions, made under such circumstances, were not admissible in evidence. The judgment is reversed, and the cause remanded for another trial.

Reversed and remanded.

DAVIDSON, J., absent.

EVIDENCE—CONFESSIONS WHEN ADMISSIBLE AS.—Confessions of a party accused of crime are admissible in evidence only when it is clearly shown that they were freely and voluntarily made: *Murray v. State*, 25 Fla. 528; *Craig v. State*, 30 Tex. App. 619; *Jackson v. State*, 29 Tex. App. 458; *State v. Demarest*, 41 La. Ann. 617; *People v. Chapleau*, 121 N. Y. 266; *Lyons v. People*, 137 Ill. 602; *State v. Howard*, 35 S. C. 197; *State v. Coella*, 3 Wash. 99, and confessions made under inducements of fear or favor must be excluded: *State v. Morgan*, 35 W. Va. 260; *Ewing v. State*, 29 Tex. App. 434; *Neeley v. State*, 27 Tex. App. 324; *Bubler v. State*, 33 Neb. 663; *Green v. State*, 88 Ga. 516; 30 Am. St. Rep. 167, and note. This question is thoroughly discussed in the extended notes to the following cases: *Daniels v. State*, 6 Am. St. Rep. 242-251; *Nolen v. State*, 46 Am. Rep. 253-260, and *Heldt v. State*, 57 Am. Rep. 839-842.

CASTILLO v. STATE.

[31 TEXAS CRIMINAL REPORTS, 145.]

RAPE—DECLARATIONS OF PROSECUTRIX AS RES GESTÆ.—In cases of rape anything which the woman said or did of the *res gestæ* of the ravishment, is admissible as original evidence, whether she testifies or not. Aside from and beyond this it is competent to show by her or by others, or both, that, recently after the alleged rape she complained of it to suitable persons, and exhibited, if such was the fact, marks of violence and other like indications, as confirmatory of her testimony; but neither the particulars of her complaint nor the identity of the accused can be thus given as original or independent proof.

EVIDENCE—DECLARATIONS AS RES GESTÆ.—In order to constitute declarations a part of the *res gestæ* it is not necessary that they were precisely coincident in point of time with the principal fact. If they spring out of it, were voluntary and spontaneous, and made at a time so near it as to preclude the idea of deliberate design, they may be regarded as contemporaneous, and admitted in evidence.

RAPE—DECLARATIONS OF PROSECUTRIX AS RES GESTÆ.—In a prosecution for rape, voluntary statements made by the prosecutrix to her grandmother a very few moments after the perpetration of the crime, and to another person in about one-half an hour thereafter, and while she was in great pain, torn, lacerated, and bleeding, to the effect that the man who ravished her had a scar on his face, and had followed her with a bucket in his hand, are admissible in evidence as part of the *res gestæ*.

H. H. Neill and N. B. Bendy, for the appellant.

R. H. Harrison, assistant attorney general, for the state.

149 **DAVIDSON, J.** Appellant was convicted of the crime of rape, and his punishment assessed at death.

150 Three bills of exception were reserved to the ruling of the court in relation to the admission of testimony. By the first bill it is made to appear that the prosecutrix was permitted to testify, "that she told her grandmother, Luz Juarez, when she got home, that a man who followed her, who had a scar on his face, took her and pulled her in the bushes, near where there is a mesquit bush, close to Mr. Lyons' house, and did bad things to her and hurt her." By the second bill it is disclosed that the same witness testified: "After I got home, Matias Villareal came to where I was at my grandmother's, and I told him that the man whom he saw following behind me with a tin bucket in his hand, and who had a scar on his face, was the man who took me and hurt me; and Matias told me that he knew him well." The third bill is reserved to the admission of the testimony of the witness Villareal, which was in substance the same as that stated in the second bill of exceptions.

The statement to the grandmother was made in a very few minutes after the act was committed, and the statement to Villareal was made in about one-half hour thereafter, and while the prosecutrix was lying on a bench, hurt and bleeding. In each instance it was objected that it was not competent for the state to prove anything the injured party stated except the fact that she made complaint of the outrage committed upon her, and that it was not proper to admit in evidence any statement she may have made as to who committed the offense, or the facts and particulars attending its commission, other than the fact that the complaint was made. The court, in signing the bills of exceptions, states "that the statements were so closely connected with the acts, both as to the time and place, as to be part of the *res gestæ*," etc.

The law is well settled in this state, where the injured female makes complaint of the fact that she has been ravished, that fact can be proved. It is equally well settled that the particulars of her statement or complaint cannot be introduced by the state as original and independent testimony. Such evidence may, however, be introduced in rebuttal in support of her veracity, and for the purpose of establishing the accuracy of her testimony, when her credibility has been attacked by the defendant: *Lawson v. State*, 17 Tex. App. 292; *Johnson v. State*, 21 Tex. App. 368; *Holst v. State*, 23 Tex. App. 1; 59 Am. Rep. 770; *Pefferling v. State*, 40 Tex. 486; Willson's Criminal Statutes, sec. 915. In this connection it may also be stated that in cases of rape the identity of the accused cannot be proved by such statement of the prosecutrix, nor can it be by this means shown who committed the offense: *Johnson v. State*, 21 Tex. App. 368.

But these rules are inapplicable when the details of such statement are sought to be proved as *res gestæ* of the transaction. In one instance the details of the complaint cannot be used except as corroborating testimony, while in the other it is *res gestæ*, and may be introduced as original ¹⁵¹ and independent evidence. The question here presented is, was the evidence sought to be excluded properly admitted as *res gestæ* of the transaction to which it refers? The rule authorizing evidence of the detailed statement as *res gestæ* is not to be confounded with that which permits evidence that complaint was made, but rejects the details and particulars of such complaint. These rules are widely different, and the distinction is plainly observed and noticed in the authorities.

When *res gestæ*, it is original primary testimony, and can be introduced as such, but under the other rule it can only be used as sustaining or corroborative evidence.

Speaking of this difference, Mr. Bishop says: "On ordinary grounds, anything which the woman said or did of the *res gestæ* of the ravishment will be admissible in evidence; and there is considerable room for strengthening her testimony in this way, especially where she exhibits marks of violence in connection with expressions indicative of her physical condition. But aside from and beyond this, it is competent to show by her or by others, or both, that after the alleged rape, especially recently after, she complained of it to suitable persons, and exhibited, if such was the fact, marks of violence and other like indications, as confirmatory of her sworn testimony. It is of special practical importance that the complaint was recent, and explanations of any delay are competent. . . . Neither the particulars of her complaint nor the name of the person whom she mentioned as the offender can by the English and more common American practice thus be given. . . . The effect of this evidence is mainly to sustain the witness; it is not independent proof. If, therefore, the injured female does not appear as a witness, this evidence cannot be given. But what is of the *res gestæ*, as stated in the opening of this section, is competent, whether she testified or not": 2 Bishop's Criminal Procedure, sec. 936, and notes; also secs. 625, 626, and notes. See, also, 1 Wharton's Criminal Law, sec. 566. This distinction is expressly recognized by this court in *Veal v. State*, 8 Tex. App. 474.

In *Regina v. Eyre*, 2 Fost. & F. 579, it is said: "Whatever she [referring to the prosecutrix] said immediately after the occasion, and what was said to her in answer, is equally evidence." The statement may be made at a time and place so remote from the principal fact as to preclude it as *res gestæ* of such facts, and yet not exclude it when it is offered for the purpose of showing that the complaint or statement was made. In case it was *res gestæ* the details of the statement are admissible in evidence; if not *res gestæ*, the particulars of such statement cannot be introduced. The difference between the rules is distinct and easily comprehended. If the evidence set out in the bills of exception was *res gestæ*, it was clearly admissible; if not *res gestæ*, it should have been excluded. In case of a conviction for an assault with intent to rape, this court has held that it was proper to permit a witness to tes-

tify to the ¹⁵² statements of the prosecutrix made with regard to the occurrence, the details of the transaction, her nervous condition, and the swollen appearance and blood upon her wrist. The statement was made a few moments after the occurrence, and it was there said: "These statements of the prosecutrix, and her appearance and condition were heard and seen by the witness in a very few minutes after the occurrence, and were *res gestæ*": *Lights v. State*, 21 Tex. App. 308.

In *Lewis v. State*, 29 Tex. App. 201, 25 Am. St. Rep. 720, it is said by this court: "In order to constitute declarations a part of the *res gestæ*, it is not necessary that they were precisely coincident in point of time with the principal fact. If they sprang out of the principal fact, were voluntary and spontaneous, and made at a time so near it as to preclude the idea of deliberate design, they may be regarded as contemporaneous, and are admissible in evidence": See, also, *Foster v. State*, 8 Tex. App. 248; *Boothe v. State*, 4 Tex. App. 202; *Tooney v. State*, 8 Tex. App. 452; *Stagner v. State*, 9 Tex. App. 441; *Warren v. State*, 9 Tex. App. 619; 35 Am. Rep. 745; *Neyland v. State*, 13 Tex. App. 536; *Washington v. State*, 19 Tex. App. 521; 53 Am. Rep. 387; *McInturf v. State*, 20 Tex. App. 335; *Pierson v. State*, 21 Tex. App. 15; *Smith v. State*, 21 Tex. App. 277; *Powers v. State*, 23 Tex. App. 42; *Irby v. State*, 25 Tex. App. 203; *Fulcher v. State*, 28 Tex. App. 465; *Craig v. State*, 30 Tex. App. 619.

In Lewis' case the conviction was for murder, and the statement of the deceased was made to two witnesses, at different times, from a half hour to one and a half hours after the occurrence; in Fulcher's case the statement of the wounded party was made about thirty minutes after he was shot; and in both cases the statements were held to be *res gestæ*: *Lewis v. State*, 29 Tex. App. 201; 25 Am. St. Rep. 720; *Fulcher v. State*, 28 Tex. App. 465.

In this case the statements were made to the grandmother in a very few moments after the offense was committed, and within a very short distance of the scene of the crime, and to the witness Villareal in about half an hour. The prosecutrix was a child of about eleven years of age, badly developed for her age, and at the time of making the statement suffering great pain; was torn, lacerated, and bleeding from the effects of the recent rape, and was scared and excited. Her statement was voluntary, and uninfluenced by persuasion, sugges-

tion, or other influence or consideration. She stated no name, and in fact she did not know the name of the perpetrator of the outrage, but could and did give an accurate description of him. He was a stranger to her. Such facts and circumstances preclude the idea of fabrication, or deliberate design in making the statements. On the contrary, they were voluntary and spontaneous; as much ¹⁵³ so as if uttered at the very time of the outrage. The statements were *res gestæ*, and clearly admissible.

We have examined the other questions raised by counsel, but find no error in any of them. It is not necessary to discuss them. The charge was a clear presentation of the law of the case. The evidence discloses a most brutal assault upon a child, and a rape horrible in its details. Defendant sought to prove an *alibi*. His testimony was conflicting, and the witness introduced by him contradicted his individual testimony in every material aspect relating to the facts of the *alibi*. Defendant was positively identified by the prosecutrix as the perpetrator of the crime. Her testimony was strongly corroborated in every respect. If the witnesses testified truthfully in this case, defendant is guilty, and his conviction proper; and no discredit is thrown upon the evidence of the prosecution. As the record presents the case to us, the defendant has had a fair and impartial trial, and the judgment is affirmed.

Affirmed.

Judges all present and concurring.

RAPE—EVIDENCE.—DECLARATIONS OF PROSECUTING WITNESS AS PART OF RES GESTÆ: See the extended notes to the following cases, where this subject is discussed: *Field v. State*, 34 Am. Rep. 479; *Smith v. State*, 30 Am. Dec. 371; and *Oleson v. State*, 33 Am. Rep. 369; also *McMurry v. Right*, 30 Iowa, 322.

EVIDENCE—ADMISSIBILITY OF DECLARATIONS IN CRIMINAL CASES AS PART OF THE RES GESTÆ.—To constitute declarations a part of the *res gestæ*, it is not necessary that they were precisely coincident with the principal fact. If they sprang out of the principal fact, tend to explain it, were voluntary and spontaneous, and made at a time so near it as to preclude the idea of design, they may be regarded as contemporaneous, and admitted in evidence: *Levie v. State*, 29 Tex. App. 201; 25 Am. St. Rep. 720, and note; *Hamilton v. State*, 36 Ind. 280; 10 Am. Rep. 22, and note; *People v. Vernon*, 35 Cal. 49; 95 Am. Dec. 49, and note at page 56. The declarations of a person upon whom an assault was made, uttered immediately after the assault, are admissible as parts of the *res gestæ* in a criminal case: *Monday v. State*, 32 Ga. 672; 79 Am. Dec. 314, and note; *Drake v. State*, 29 Tex. App. 265. See the note to *Moses v. State*, 16 Am. St. Rep. 23; and the extended notes to *Field v. State*, 34 Am. Rep. 479; and *State v. Molisee*, 58 Am. Rep. 184.

BENAVIDES v. STATE.

[31 TEXAS CRIMINAL REPORTS, 172.]

JURY TRIALS—RIGHT TO RECALL JURY AND GIVE ADDITIONAL INSTRUCTIONS.—In a criminal case the court may, of its own motion, after the jury has retired and before verdict, recall the jurors into open court and give them further instructions whenever it is deemed necessary to do so, provided the defendant is present when such action is taken, or has waived his right to be present.

JURY TRIAL—EXCEPTION TO INSTRUCTIONS—RECALLING AND PROPERLY INSTRUCTING JURY.—The defendant may, at any time before verdict, reserve exceptions to the charge of the court as given to the jury, but the bill containing such objections, to be entitled to consideration on appeal, must point out the error or errors complained of with particularity, and not in general terms.

JURY TRIALS—RIGHT OF COURT TO RECALL AND PROPERLY INSTRUCT JURY. Upon the discovery, after the retirement of the jury in a criminal case, of an omission or error in the instructions as given, it is the right of the court to rectify the error by proper instructions, no matter whether such error is discovered by the court, or called to its attention by an exception properly taken by counsel. To this end the jury may be recalled into open court, before verdict, and properly instructed, in the presence of the defendant, whether he objects to such instruction or not.

JURY TRIALS—RIGHT TO RECALL AND INSTRUCT JURY.—The right of the trial court, of its own motion, to recall the jury in a criminal case before verdict, and to give additional instructions, is not abridged by a statute authorizing the jury to ask further instructions of the court touching any matter of law.

Coopwood and Coopwood, for the appellant.

R. L. Henry, assistant attorney general, for the state.

174 **DAVIDSON, J.** This appeal is prosecuted from a conviction of horse theft.

Counsel for appellant prepared and requested the court to give the jury several instructions, all of which were refused, except one, because, substantially, they had already been given in the charge of the court. Upon an inspection of the record we are of opinion that the court was correct. Repetition of charges is not necessary: Willson's Criminal Statutes, sec. 2354.

During their retirement, and prior to their verdict, the court, of its own motion, had the jury recalled into open court, and gave them an instruction with reference to the law of circumstantial evidence. This action of the court was excepted to, because the court is invested with no authority, of its own motion, to recall the jury after their retirement, and give additional charges; and the charge as given was also ex-

cepted to, because it did not state correctly the law on the subject. The charge as given is not subject to the criticism sought to be urged against it. It is contended by appellant that the court had no authority to recall the jury, of its own motion, after their retirement, and give the additional instruction. In support of this proposition we are cited to the latter clause of article 1464 of Paschal's Digest, which provides that "all charges or instructions, whether given by the judge of his own accord, or upon request of counsel or parties, may be carried from the bar by the jury in their retirement, and no judge shall in any case make any further charge, unless on the application of the jury, or a party, or his counsel." This article ¹⁷⁵ applies as well to criminal as civil causes: *Goss v. State*, 40 Tex. 520; *Taylor v. State*, 42 Tex. 504; *Garza v. State*, 3 Tex. App. 286.

The construction placed on that portion of the quoted statute which provided, that "no judge shall in any case make any further charge, unless on the application of the jury or a party or his counsel," was to the effect, that it was an express inhibition upon the authority of the court, of its own motion, in any case, to give additional instructions to the jury after their retirement: Same authorities. This limitation, however, upon the power of the court was omitted by the legislature in revising the codes in 1879, and was therefore abrogated, and since the adoption of the codes has ceased to be the law in this state: Rev. Stats., arts. 1316, 1317, 1319, 1321. The decisions cited by appellant are not in point, and are no longer authority in this state, because rendered under the repealed act.

In felony cases the court is required to deliver the jury a written charge, in which the law applicable to the facts shall be distinctly set forth. The judge is prohibited from expressing an opinion as to the weight of the evidence, as well as from summing up the testimony; and he is required to give such charge whether asked or not: Code Crim. Proc., art. 677. When the charge has been given, the defendant may reserve his bill of exceptions thereto, in order that the same may be revised upon appeal: Code Crim. Proc., art. 686. This bill, in order to entitle it to consideration on appeal, must point out the error complained of with particularity. It is not sufficient that the charge is assailed by it in a general way, or in general terms: *Williams v. State*, 22 Tex. App. 497; *Smith v. State*, 22 Tex. App. 316; *Hennessy*

v. *State*, 23 Tex. App. 340; *Peace v. State*, 27 Tex. App. 83; *Quintana v. State*, 29 Tex. App. 401; 25 Am. St. Rep. 730. It is also necessary that such exception must be taken prior to the return of the verdict of the jury: *McCall v. State*, 14 Tex. App. 353; *Phillips v. State*, 19 Tex. App. 158; *Bogan v. State*, 30 Tex. App. 466. If the court could not recall and properly instruct the jury when his attention was called to the defects pointed out by the exception, we would have the strange condition of a fatal error being pointed out by the exception, and yet the court legally helpless to cure the evil or remedy the wrong; and we would be confronted with the stranger proposition still, that a party, after excepting to an erroneous instruction, would be heard to successfully complain that the error of which he complained was cured by proper instructions, and by this means his legal rights secured to him. We entertain no doubt as to the correctness of the action of the court in this matter.

When an omission or error has been discovered in the charge, whether by the court or counsel, it is the right, and may become the duty, of the ¹⁷⁶ court to rectify the error by a proper charge, and to this end the jury may be recalled into open court and properly instructed, provided the defendant be present. Mr. Thompson, in his valuable work on Trials, says: "We have seen that it is the right, and sometimes the duty, of the judge to instruct the jury on questions of law, although not requested to do so, except where the practice is not enjoined by statute. We have also seen that the judge may rightfully modify or revoke instructions which he has given to the jury, which, on further reflection, he concludes to be erroneous. It necessarily results from this that the judge may, of his own motion, recall the jury, and give them further instructions, whenever he considers it necessary to do so": 2 Thompson on Trials, secs. 2353, 2363.

The limitation upon this privilege or power of the court in this state is found in the right of the defendant to be present when such action on the part of the court is had. This right the defendant can waive. Subject to such limitation, the jury may be recalled by the court, of its own motion, and such legal and necessary additional instructions may be given them as "the law of the case" makes necessary, or the testimony may require: Sackett's Instructions to Juries, sec. 81; Thompson on Charging Juries, 131, 132; 11 Am. & Eng. Ency. of Law, 256, 257, and notes; *Nicholson v. State*.

38 Md. 153; *Jones v. Van Patten*, 3 Ind. 107; *Hall v. State*, 8 Ind. 439, 444; *State v. Pitts*, 11 Iowa, 343; *Lee v. Quirk*, 20 Ill. 392; *Davis v. Fish*, 2 G. Greene, 447; *O'Connor v. Guthrie*, 11 Iowa, 80; *Campbell v. Beckett*, 8 Ohio St. 210; *Hoberg v. State*, 3 Minn. 262; *Breedlove v. Bundy*, 96 Ind. 319; *People v. Perry*, 65 Cal. 568; *Alexander v. Gardiner*, 14 R. L. 15; *Booker v. State*, 76 Ala. 22, 24. Nor is this privilege and authority in the court abridged by the statute which authorizes the jury to ask further instructions of the court touching any matter of law. The court did not err in this matter. The charge of the court sufficiently presents the law applicable to the facts adduced. Having found no reversible error in the record, the judgment is affirmed.

Affirmed.

Judges all present and concurring.

TRIAL—RECALLING JURY FOR FURTHER INSTRUCTIONS.—The court has a right to give the jury further or explanatory charges in a case where counsel have voluntarily absented themselves from the courtroom, if the prisoner is present: *Collins v. State*, 33 Ala. 434; 73 Am. Dec. 426. A verdict will not be set aside where the court, in response to an inquiry from the jury, correctly states the law: *Perkins v. Commonwealth*, 7 Gratt. 651; 56 Am. Dec. 123. After a jury had retired to consider their verdict, the court sent to them, in answer to their request, an instruction in writing, and also a copy of the statute, without the knowledge of counsel on either side. It was held to be error: *State v. Patterson*, 45 Vt. 308; 12 Am. Rep. 200.

APPEAL—SUFFICIENCY OF EXCEPTIONS.—An exception to the charge of the court, which does not assign any reason for the exception, nor point out the respect in which the charge is claimed to be incorrect or insufficient, will not be considered on appeal: *Quintana v. State*, 29 Tex. App. 401; 25 Am. St. Rep. 730. See, also, *Welcome v. Mitchell*, 81 Wis. 566; 29 Am. St. Rep. 913.

SIMON v. STATE.

[31 TEXAS CRIMINAL REPORTS, 126.]

INCEST—DECLARATIONS OF PARENTS TO PROVE ILLEGITIMACY.—On the prosecution of a man for an incestuous marriage with the daughter of his half sister by the same father, declarations by his deceased mother and father that he is an illegitimate child, not the son of his supposed father, and that there is no blood relationship between himself and his wife, are inadmissible in the absence of evidence of non-access between the supposed parents, or that they were living apart, or that the supposed father was impotent at the time the accused was conceived.

INCEST—DECLARATION OF PARENT TO PROVE ILLEGITIMACY.—On the prosecution of a man for an incestuous marriage, the declarations of his deceased mother that he is illegitimate, though born in wedlock, made to

him about the time of his marriage, are inadmissible to prove good faith on his part in entering into the marriage.

MARRIAGE, EVIDENCE OF.—The fact that a woman assumes a certain name, and gives her child that name, is no proof of her marriage with a man who bears that name.

INCEST—ILLEGALITY OF MARRIAGE AS DEFENSE.—On the prosecution of a man for an incestuous marriage, proof of his cohabitation with or carnal knowledge of a female relative within the prohibited degrees, is sufficient to establish his guilt, without proof of a valid marriage, and the fact that the person who solemnized the marriage ceremony was unauthorized to do so, does not affect the guilt of the accused, nor entitle him to an acquittal.

MARRIAGE, VALIDITY OF.—Whatever be the form of ceremony, or if there be no ceremony, and the parties, if capable of consent, agree presently to take each other for husband and wife, and from that time live professedly in that relation, these facts are sufficient to constitute proof of a marriage binding on the parties, and subjecting them to legal penalties for a disregard of its obligations.

INCEST.—AN INDICTMENT charging incest is not defective in alleging that the accused "did unlawfully intermarry," because it fails to allege affirmatively that there was a marriage, nor is it fatally defective in failing to charge that the accused "knowingly" entered into an unlawful marriage, if the statute defining incest does not employ the word "knowingly."

PRACTICE.—INADMISSIBLE EVIDENCE NOT EXCEPTED TO at the time it was offered cannot be complained of on appeal, in the absence of a motion to strike it out after it was so admitted by the trial court.

Crain, Kleberg, and Grimes, and Baker and Summers, for the appellant.

R. L. Henry, assistant attorney general, for the state.

199 **SIMKINS, J.** Appellant was convicted in the district court of Goliad county of incest, his punishment being assessed at three years in the penitentiary, from which he appeals. There are two grounds of error submitted for reversal which demand consideration.

1. The error of the court in excluding the testimony of Louis and Theresa Budde and Henry Simon as to the declarations of Caroline Simon, the deceased mother of defendant, and Mathias Simon, his putative father, to the effect that defendant was not the son of Mathias, her husband, and that if defendant got into trouble by his marriage she would protect him. The evidence shows that Mathias Simon was twice married; that Theresa Budde was the offspring of his first marriage; that witness Henry and the defendant, Theodore, were the result of the second marriage, which was with Caroline Malitz; that on the thirtieth day of September, 1888, defendant married Carrie, the daughter of his half sister, Theresa

Budde. The object of the testimony was: 1. To show there was no blood relation between defendant and Carrie Budde; and 2. To show that defendant in marrying acted in good faith, honestly believing that no relationship existed between Carrie Budde and himself, and therefore he could not be amenable to law, even though the relationship in fact existed. We are of opinion that the court did not err in rejecting this testimony. It is the rule established in England and America, and supported on the highest considerations of public policy, that the lips of parents are sealed as to any testimony which would assail the legitimacy of their children born in wedlock (Wharton's Criminal Evidence, 518), and relationship is to be proven as in civil cases: Pen. Code, art. 332; 2 Am. & Eng. Ency. of Law, 140.

It is not pretended, nor is there any offer on the part of appellant, as ³⁰⁰ a predicate for such testimony, to show that there was non-access, or that the said Mathias and Caroline were not living together, or that the said Mathias had become impotent when defendant was conceived in his mother's womb: Bishop on Marriage and Divorce, secs. 1168-1171. There is certainly no question as to the legitimacy of Henry Simon, the younger brother of defendant. Had Mrs. Simon been living her testimony would not have been admissible, especially since Mathias was dead, the putative father of defendant: Bishop on Marriage and Divorce, sec. 1179. The rule invoked by counsel, on the admissibility of declarations of deceased persons as to relationship and birth, death, and marriage, establishing pedigree, can have no application, for, if she could not testify living, her declarations would not be admissible after her death: 1 Greenleaf on Evidence, 104.

2. Nor do we think the court erred in refusing to admit the declarations of Caroline Simon to sustain appellant's plea of marriage in good faith. As it appears of record, some time in 1857, Mathias Simon, a widower with one child (Theresa) intermarried with Caroline Malitz, also with one child (Gus), and they lived together as husband and wife until 1867, when Mathias died, leaving Caroline with two children, Henry and Theodore, as the fruit of their marriage. It was understood by all the family and neighbors that defendant was the son of Mathias and Caroline Simon; he was always recognized as such, and no question was raised as to defendant's legitimacy until at or about the time of his marriage to Carrie Budde, his half niece. Now, the only evidence on which it is sought

to hinge good faith is the purported declarations of the mother, that, if defendant got into trouble about it, she would protect him; that he was not the son of his putative father, Mathias. How Mrs. Simon proposed to prove this fact seems to have been locked in her own bosom and to have died with her. No witness who knew her in years past points out a single suspicious fact or rumor. Defendant himself shows not the slightest interest in learning who was his real father; he was satisfied with her promise to protect him. This refreshing confidence of a man thirty years of age in the protecting power of the mother to shield him from the law would unquestionably invoke one's sympathy, were it not that he entered into this marriage with the knowledge that the only way his mother could protect him was by bastardizing him and dishonoring herself. For thirty years she had lived as an honest woman and a true wife; yet the defendant does not seem to have hesitated in demanding the sacrifice. Such is the testimony her own children seek to introduce against Mrs. Caroline Simon, deceased.

We cannot hold such evidence admissible as a basis for good faith on the part of defendant. If such declarations were ever made by the dead mother, they are not shown to have been made sufficiently *ante litem motam*. The illegitimacy of defendant seems to have been utterly unknown to the family and to defendant himself until about the time of ~~201~~ defendant's marriage, and then she said she would protect defendant if he got into trouble. It is true Mrs. Theresa Budde offered to testify that her father and Caroline Simon told her that defendant was illegitimate. The time of these declarations is not stated. If Mathias Simon told her, it must have been before his death in 1867; yet, so far as appears of record, she never communicated this important fact either to her husband or defendant, and therefore it could not have been ground for good faith and honest belief by the defendant. On the contrary, as testified to by the witness Sitterlee, Mrs. Budde stated on the very night of the marriage that her daughter was defendant's half niece.

Neither is there any force in the objection that the court failed to charge the jury that it must be shown to them that Charles Malitz was dead or divorced before they could find the marriage of Mathias Simon and Caroline Malitz was legal and valid. There was no evidence of any marriage between Charles Malitz and Caroline Malitz, save the fact that Mrs.

Malitz was so named, and her son (Gus) claimed Malitz as his father. It has never been held that a name and child were proof of marriage: Bishop on Marriage and Divorce, sec. 1029.

The most interesting question arises out of defendant's marriage. The state, on trial of the case, proved that a license was duly issued September 28, 1888, by the county clerk of Victoria county, authorizing the marriage of Theodore Simon and Carrie Budde; that the marriage was performed by S. D. Hall, a justice of the peace of Victoria county, who duly returned said license September 30, 1888, "executed by joining in marriage the within-named parties"; but the state further proved that the justice of the peace crossed over into Goliad county and performed the ceremony. It is insisted that there was no marriage, because the justice of the peace cannot marry parties outside of his county; that when he went outside of his county he became but a private person, not qualified to discharge any official act; that the indictment simply alleges that the defendant committed incest by intermarrying with his niece, and the state having shown there was no marriage, the prosecution falls to the ground. Without conceding the correctness of the proposition that a justice may not perform a valid marriage ceremony outside of his own county, we are of the opinion that the charge of incest is sufficiently proven to authorize and sustain the judgment rendered in this case.

The crime of incest, though defined under our statute (Penal Code, art. 329) to be the intermarrying or carnal knowledge of persons within the forbidden degrees, does not require proof of marriage to sustain it. But where the state proves either cohabitation (that is, living together as husband and wife) or carnal knowledge, the statute declares such proof shall be sufficient proof of defendant's guilt in all cases of incest, without the proof of marriage: Pen. Code, art. 332. So that when incest is charged in an indictment alleging intermarriage between persons within ²⁰² the prohibited degrees, it may be proved by cohabitation, and defendant could not answer said charge by attacking the validity of the marriage as he could in adultery or bigamy. While the statute on incest contemplated two classes of cases, to wit, those who lived together as husband and wife and those having carnal knowledge without pretending to or claiming the relation of husband and wife, yet it was striking at the evil of carnal

knowledge, with or without marriage, between persons within the prohibited degrees.

In the case at bar the state fully made out the case of incest by proving the cohabitation of defendant with Carrie Budde, and the fact that the officer performing the ceremony may not have been authorized to act does not change the issue nor entitle defendant to an acquittal. Neither do we think that the fact of the officer being disqualified to act (if he was disqualified) rendered the marriage void. We are aware the rule generally laid down by the authorities is that a marriage must be proved in all cases of bigamy, adultery, and criminal conversation: 2 Greenleaf on Evidence, sec. 461; 2 Bishop on Marriage and Divorce, sec. 1038. Yet all that can be required in any case is proof of a valid marriage, for a violation of which the parties thereto may be punished. In our opinion, the record shows such marriage.

Mr. Greenleaf, after a careful examination of all the decisions and law-writers, states the rule to be that marriage is a civil contract, to the validity of which the consent of parties able to contract is all that is required by natural or public law; and though in most, if not in all, the United States there are statutes regulating the celebration of marriage rites, yet it is generally considered, when the state does not declare void marriages not celebrated in the prescribed way, or by certain magistrates or ministers, any marriage, regularly made according to the common law, would still be a valid marriage: 2 Greenleaf on Evidence, sec. 460; 1 Bishop on Marriage and Divorce, secs. 435, 449; *Meister v. Moore*, 96 U. S. 82.

In *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164, Cooley, J., in speaking of proof necessary in an action of criminal conversation to establish a foreign marriage, says: "Had the proposed marriage taken place in this state, evidence that a ceremony was performed with the apparent consent and co-operation of the parties would have sustained proof of marriage, though statutory regulations had not been complied with. Whatever be the form of the ceremony, or, if there be no ceremony, if the parties agree presently to take each other for husband and wife, and from that time on live professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding on the parties, which would subject them to legal penalties for a disregard of its obligations. This has been the settled doctrine of the American courts, and the few cases of apparent dissent are

borne down by the great weight of authority in favor of the rule stated." Mr. Cooley cites numerous authorities ²⁰³ to sustain the rule, which we think is to be commended for its common sense.

Tested by this rule, we think that in this character of case there is sufficient evidence in the record to show a valid and binding marriage between defendant and Carrie Budde, had they not been within the prohibited degrees. There was not only a marriage ceremony in which the mutual consent to live together as husband and wife was publicly solemnized, but they did live together as such, and only separated on being indicted by the grand jury in 1891, and this, under all the authorities, is sufficient to prove a valid marriage. There being no other error that need be considered, we think the judgment should be affirmed.

Affirmed.

Judges all present and concurring.

ON MOTION FOR REHEARING.

SIMKINS, J. The grounds presented for a rehearing of this cause were not presented in the brief of appellant at the original hearing, nevertheless we have examined them with that degree of care and attention demanded by the importance of the questions involved and the standing and ability of the counsel so ably presenting them.

1. We do not agree with counsel, that the indictment is "fatally defective in alleging that defendant did unlawfully intermarry C. Budde, because it thereby failed to charge affirmatively that there was a marriage." The indictment is correct; it charged a marriage and that it was an unlawful one.

Nor do we think it is fatally defective because it fails to charge that defendant knowingly entered into an unlawful marriage with C. Budde. The statute (Pen. Code, art. 329) does not employ the word "knowingly" in defining incest.

One of the cases referred to by appellant construes a statute similar to ours, and holds directly against appellant's position: *State v. Bullenger*, 54 Mo. 143. In this case the supreme court held it was not necessary that the indictment should charge that defendant knew that the person with whom he intermarried was in any way related to him. And indeed this is in consonance with the decisions of our own court and the ordinary rules of pleadings: Willson's Criminal Statute, secs. 111, 114, 1955.

Where, however, the statutory definition contains the word "knowing" or "knowingly," the rule is different. It then becomes the duty of the pleader to set forth in the indictment that the prohibited act was "knowingly" entered into. And to this effect are the cases cited in appellant's brief: *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691, and *Williams v. State*, 2 Ind. 439. See, also, *Baker v. State*, 30 Ala. 521; *Bergen v. People*, 17 Ill. 426; 65 Am. Dec. 672; *Hicks v. People*, 10 Mich. 395.

2. Nor do we agree with counsel, that "the charge of the court is fatally defective in charging that if the jury believe that C. Budde is the daughter of a half sister of defendant, they should find defendant guilty, because it is a charge on the weight of evidence, and tells the jury to convict if defendant married C. Budde and she was the daughter of any half sister of defendant." It is not on the weight of evidence, because it did not assume that the mother of C. Budde was a half sister of defendant. On the contrary, the charge distinctly left it to the jury to decide whether the relationship existed or not. The words are, "If C. Budde is a daughter of a half sister of the defendant." Nor is the charge susceptible to the criticism that it authorized defendant's conviction if C. Budde was the daughter of any half sister of defendant. There is no dispute or question in the evidence that C. Budde was the only daughter of Theresa Budde. The witnesses for state and defendant proved that fact, and the indictment alleged it. The charge must be looked at in the light of the evidence; and the jury could have understood nothing else from the charge in the light of the evidence but that the issue presented to them was the relationship between defendant and the mother of C. Budde, and not whether C. Budde was the daughter of Theresa Budde or of some other unknown half sister of defendant.

The cases cited by appellant do not support his contention, for the reason that they simply assert that it is error for the court to charge on a phase of the case not made by the evidence.

3. Appellant contends that the introduction of the testimony of Louis Sitterlee, that he was informed by Theresa Budde, the mother of Carrie Budde, that the said C. Budde was the half niece of defendant, and he so informed defendant a short time before his marriage, did great injury to defendant, and certainly authorized him to introduce the declarations of his deceased mother to rebut the declarations

of the mother of C. Budde; that if it is against public policy to allow the mother to impeach her own chastity, that defendant should not have evidence introduced as to information to a different purport communicated by another who was not in condition to know.

The evidence of Louis Sitterlee was not objected to nor an exception reserved to its admission, nor was any motion made to strike it out; on the contrary, Mrs. Budde took the stand and denied the statement. What relationship was borne by the witness Sitterlee to the defendant or his family, other than being a friend, is not disclosed by the record. He was one of the guests who went from Victoria county over to Goliad, in company with the justice, to see the marriage. There were not many present. An hour before the marriage he told defendant, after being so informed by T. Budde herself, that he ought not to marry C. Budde, because ²⁰⁵ she was his niece. His warning was disregarded.

The evidence further shows, that defendant had been partially raised after the death of his father in his sister's (Mrs. Budde's) house. That no question of his legitimacy was raised until his ill-fated affection for his niece began, and then it appears to have been discussed. The father of C. Budde goes to visit the mother of defendant, and tells her that he understands that T. Simon is not related to his wife and daughter, and that it would be a serious thing for his daughter to marry her uncle, and that thereupon she gave him to understand that defendant was illegitimate, and she would protect him from a criminal prosecution. Without further inquiry, and relying upon this indefinite statement, the marriage is allowed to take place. Defendant's mother died before the marriage, and such a conversation was sought to be introduced on the trial to rebut the family recognition and belief that existed from defendant's birth, and his own belief (for it does not appear that defendant himself ever heard to the contrary till he wanted to marry), and the presumption of wedlock as to children born therein. It seems, however, that the justice of the peace from Victoria who went across to perform the marriage contract, after talking with the parents of the girl, decided to perform the marriage, and did so, and defendant cheerfully accepted this decision, and paid no attention to the warning of Sitterlee. Whatever weight the judicial action of the justice may have in a plea for executive clemency, it can have none before this court.

And the trial court, as we held before, did not err in excluding said testimony.

The motion is overruled.

PARENT AND CHILD—DECLARATIONS OF PARENT AS TO LEGITIMACY OF CHILD.—The declarations of a husband or wife are inadmissible during their lifetime to bastardize the issue, but after their death they are admissible: *Wright v. Hicks*, 15 Ga. 160; 60 Am. Dec. 687. The admission of a father is competent evidence to show that the person with whom he had sexual intercourse was his daughter: *Bergen v. People*, 17 Ill. 428; 65 Am. Dec. 672. See, also, *Woodward v. Blue*, 107 N. C. 407; 22 Am. St. Rep. 897.

MARRIAGE.—EVIDENCE OF IN CRIMINAL CASES: See the extended notes to *Appeal of Reading Fire Ins. etc. Co.*, 57 Am. Rep. 451-463, and *Cameron v. State*, 48 Am. Dec. 115.

MARRIAGE—WHAT CONSTITUTES A VALID.—A marriage by an unauthorized person or without a license is valid if the parties consent thereto and afterward cohabit together: *Farley v. Farley*, 94 Ala. 501; 33 Am. St. Rep. 141, and note with the cases collected.

INCEST—INVALID MARRIAGE AS A DEFENSE.—Under a statute prohibiting the commission of the sexual act between persons "nearer of kin than cousins," an indictment charging incest between uncle and niece need not allege that they were not husband and wife, whether they had gone through the ceremony of marriage or not. Nor is it material that the marriage was valid: *State v. Brown*, 47 Ohio St. 102; 21 Am. St. Rep. 790, and note. The lewd and lascivious cohabitation between a man and the daughter of his half brother is punishable as incest: *State v. Reedy*, 44 Kan. 190.

APPEAL.—An exception to evidence admitted is not available on appeal where no objection is made until after its admission, and no motion is made to strike it out: *Hargen v. Hachmeister*, 114 N. Y. 566; 11 Am. St. Rep. 691. An objection not made in the trial court will not be considered on appeal: *Coad v. Home Cattle Co.*, 32 Neb. 761; 29 Am. St. Rep. 463; *Fleming v. Springfield*, 154 Mass. 520; 26 Am. St. Rep. 268; *London v. Youmans*, 31 S. C. 147; 17 Am. St. Rep. 17; extended note to *Chapman v. City Council*, 13 Am. St. Rep. 685.

EVERS v. STATE.

[51 TEXAS CRIMINAL REPORTS, 312.]

MANSLAUGHTER—INSULTING WORDS.—To reduce a homicide from murder to manslaughter because of the use of insulting words by the deceased, the killing must take place immediately upon their utterance.

MURDER.—EVIDENCE OF VIOLENT CHARACTER OF DECEASED is not admissible on a trial for murder in the absence of any act on his part indicating any purpose whatever to take the life of the accused or to do him bodily harm.

INTOXICATION AS DEFENSE TO CRIME.—Mere intoxication from the recent use of ardent spirits does not excuse or mitigate the degree or penalty of any crime. Such intoxication must go to the extent of producing temporary insanity before it can mitigate the penalty, or be considered in murder cases to determine the degree of murder.

INTOXICATION AS DEFENSE TO CRIME.—Mere intoxication is no defense in any criminal prosecution, regardless of the constituent elements of the crime. Temporary insanity produced by recent intoxication is not a defense to any crime, but is permitted to be shown in murder cases to determine the degree, and in all criminal prosecutions to mitigate or lessen the penalty.

INTOXICATION AS DEFENSE TO CRIME.—A sane man who voluntarily puts himself in such a state of intoxication as to have no control over his will or actions is held to intend the consequences springing therefrom, and cannot plead his intoxication as a defense for any criminal act committed by him while in such condition.

INTOXICATION AS DEFENSE TO CRIME.—Intoxication of an accused is generally admissible, when by statute murder is divided into degrees, solely to determine the degree of the crime.

INTOXICATION AS DEFENSE TO MURDER.—A person accused of murder who is so excessively intoxicated at the time the act is committed as to be unconscious that he is doing wrong may plead his condition. If it appears that the design to kill was not previously formed or premeditated, but was the result of a sudden, rash, and unpremeditated design, springing out of inconsiderate or irrational action or excitement, and originating in a mind so inflamed by intoxicants as to be wholly incapable of reflection or self-control, he is guilty of murder in the second degree, but nothing less, and the jury may reduce the penalty which would otherwise attach to his crime but for his condition.

INSANITY AS DEFENSE TO CRIME.—Insanity is not considered as an excuse or defense to crime unless it deprives a person of the capacity to distinguish right from wrong as to the particular act charged. If a person has knowledge and consciousness that the act he is doing is wrong and will deserve punishment, whatever be his mental weakness, he is in law of sound mind and memory, and subject to punishment, but if he is incapable of having such knowledge and consciousness, he is insane, and not responsible for the crime committed by him.

SETTLED INSANITY ARISING FROM DELIRIUM TREMENS produced by alcoholism is a complete defense to crime.

INSANITY AS DEFENSE TO CRIME.—Insanity, whose remote cause is habitual drunkenness, is an excuse for crime committed by a party while so insane, but not intoxicated or under the influence of liquor.

INDICTMENT for murder. Conviction of murder in the second degree. Some months before the homicide there had been a quarrel between the accused and the deceased, Richter. Early on the day of the homicide the accused began drinking, and, about noon, meeting the deceased in a saloon, renewed the quarrel, when the parties clinched, but were separated. Some time afterward, meeting in the street, the accused began another quarrel with the deceased. The accused then armed himself, and went to the house of the deceased, called him out, told him he had treated him as a dishonorable man, and that he had come to settle it. Deceased told the accused to kill him, but bystanders then prevailed upon the latter to go away, when deceased called to him to come back and kill him,

and then taunted him with being a "Fredericksburg Dutchman" not knowing "who his father was." The accused declined to kill him, and again went away a short distance, but the deceased kept calling to him to come back and kill him, and continued otherwise to taunt him. He thereupon returned, and asked the deceased if he had called. Richter replied "no" while standing inside his yard, in his stocking feet, and shirtsleeves, and unarmed. The accused then drew a pistol and fired at Richter, who turned, and was running away when the accused fired a second shot, striking Richter in the back of the neck and killing him instantly. There was strong evidence of temporary insanity. The accused was crying while leaving and returning to the house of deceased; seemed much under the influence of liquor, and kept displaying and handling his pistol.

Perry J. Lewis, and Denman and Franklin, for the appellant.

324 SIMKINS, J. There are numerous bills of exceptions and assignments of error, but it will be only necessary to consider the following:

1. The defendant complains that the court refused to charge the jury on manslaughter. The ground relied upon was the fact that Richter, while jeering at and abusing defendant, told him: "he didn't know who his father was." If any such remark was made by Richter it cannot avail defendant; for after it was made, said defendant turned and went away, and Richter went into the house, and according to the same witness (Florea), called to him to come back, and shook his fist at him. The statute declares that to reduce homicide to manslaughter the killing must take place immediately upon the uttering of the insulting words: Pen. Code, art. 598. The insulting language seems to have been disregarded. Defendant drew out of his own witness, Florea, the fact that defendant would not have come back, even after the alleged insult, if deceased had not kept calling him. But while the taunts and cries of "Come back and kill me," of the infuriated Richter may have led to that result, it would be none the less murder on the part of defendant.

2. The court did not err in refusing to permit defendant to prove the reputation of deceased as a violent, dangerous man. If such a character could have been proven, the deceased had certainly done no act indicating any purpose whatever to take defendant's life or do him any harm. He stood in his yard

in shirtsleeves and stocking feet, and, according to defendant's own witness, had declined to touch defendant's pistol, when defendant proposed to have a combat: Willson's Criminal Statutes, sec. 1054.

3. The court erred in admitting the cry of the cab-driver, "There he ³²⁵ goes," referring to the defendant, when the officer went out to arrest him. If the cab-driver saw the defendant making his escape, he ought to have been placed on the stand to testify to that fact.

4. There is, however, a serious question presented by the record which will necessitate a reversal of this cause. The court charged the statute on drunkenness, and then instructed the jury that "the law just quoted places a person charged with crime before the law to be tried without reference to his drunkenness, unless said drunkenness goes to the extent of producing temporary insanity. It is therefore your duty, as a preliminary inquiry, to discover the mental *status* of the defendant at the time of the homicide." Conceding the charge to be correct so far as it goes, it was manifestly insufficient merely to submit to the jury, without further comment than the charge above quoted, a statute about which there was such uncertainty and diversity of opinion, and let the jury draw their own inference as to its purport and meaning. We think the exception, duly reserved by the defendant, was well taken, to the effect that the court erred in failing to define "temporary insanity," and in failing to charge they could consider it in mitigation of the penalty after they had determined the degree of murder.

The statute on drunkenness (Pen. Code, art. 40 a) has been twice considered and passed upon by this court, and it was held, as we think, correctly: 1. That mere intoxication from the recent use of ardent spirits should not excuse nor mitigate the degree or penalty of crime; 2. That intoxication must go to the extent of producing temporary insanity before it can mitigate the penalty in any crime, or be considered in murder cases to determine the degree of murder: *Clare v. State*, 26 Tex. App. 624, and *Ex parte Evers*, 29 Tex. App. 589, in which this case was heard on *habeas corpus* on a state of facts different from that here presented. The difficulty, however, seems not to be so much in the terms of the statute as in the reluctance of the trial courts to hold that one grossly intoxicated, or temporarily insane from intoxication, is any

more liable for punishment for crime than one insane from any other cause.

The history of the statute is well known. Some ten years ago, one Porter, a traveling actor, was shot down without provocation in an eastern town in this state. The defendant was tried, and acquitted on the ground of temporary insanity, caused by drunkenness. The legislature, assembling shortly after, passed this act: "Article 40 a. Neither intoxication nor temporary insanity of mind produced by the voluntary recent use of ardent spirits shall constitute any excuse in this state for the commission of crime, nor shall intoxication mitigate either the degree or penalty of crime; but evidence of temporary insanity produced by such use of ardent spirits may be introduced by the defendant in any criminal prosecution in mitigation of the penalty attached to the offense for which ³²⁶ he is being tried, and in cases of murder, for the purpose of determining the degree of murder of which the defendant may be found guilty." By its terms there were two purposes clearly intended: 1. To eliminate mere intoxication as any defense in any criminal prosecution whatever, regardless of the constituent elements of the crime; 2. To prevent temporary insanity from being a defense to any crime, but permitting it to be introduced in murder cases to determine the degree, and in all criminal prosecutions to mitigate or lessen the penalty. The object of the statute was to prevent parties from pleading their own wrong, after voluntarily placing themselves under the influence of drink, and becoming a terror to the community, or a menace to other citizens, whose feelings are often outraged and their lives endangered or destroyed by the insolence and recklessness of such intoxicated persons. The underlying principle of the statute is that laid down by common-law writers, to wit, that a sane man who voluntarily puts himself in such a condition as to have no control over his will or actions must be held to intend the consequences springing therefrom: Pufendorf's Law of Nature and Nations, lib. 3, c. 6, sec. 4; 2 Coke on Littleton, 247 a; 1 Hale's Pleas of the Crown, 32; 4 Blackstone's Commentaries, 20.

There is no question that, under the common law, intoxication was not deemed a defense for any criminal act, even though done while a person was insensible to his surroundings, unconscious of his acts, and had no memory or understanding: *Reniger v. Fogossa*, 1 Plow. 19; *Beverley's case*, 4

Coke, 123; *Pirtle v. State*, 9 Humph. 663; and such was the law in England and America as late as 1835: *State v. John*, 8 Ired. 333; 49 Am. Dec. 396; *State v. Turner*, 1 Wright, 81; *Cornwell v. State*, 1 Mart. & Y. 147; *Rex v. Carroll*, 7 Car. & P. 145.

During the past sixty years there has been a persistent, and in the English and many of the American courts a successful, effort to ingraft upon the common-law doctrine the proposition that drunkenness ought to be admitted in evidence, not to excuse, justify, or mitigate the crime, but simply to throw light upon the mental *status* of the offender, to enable the jury to find out what crime had been committed; or rather, by proving the absence of the necessary constituents of the crime (such as malice, premeditation, intent, etc.), to show that no crime was committed. At first the proposition was only insisted upon and applied in murder cases or assaults with intent to murder; but the doctrine was soon pushed out to its logical results, and is now applied by some courts to every species of crime which has an intent. It is now generally held that intoxication is admissible as evidence in all the states where murder is divided into degrees, not to deny the guilt, but to determine the degree: Wharton on Criminal Law, sec. 51. But this innovation on the common law was vigorously opposed by the early judges. It was, indeed, by its advocates, admitted to be dangerous doctrine, and one that ought to be received with caution: Wharton on Criminal Law, sec. 51; *State v. John*, 8 Ired. 330; 49 Am. Dec. 396; *Pirtle v. State*, 9 Humph. 663. Mr. Wharton says: "It has been held with marked uniformity in this country that voluntary drunkenness is no defense to the factum of guilt. The only difference has been the extent to which evidence of drunkenness is received to determine the exactness of intent and the extent of deliberation": Wharton on Criminal Law, sec. 49.

There has been no subject upon which courts have so widely differed, or in which the same courts have so often changed their views, as upon this question. A fair illustration of this is shown in the Tennessee decisions referred to in *Lyle v. State*, 31 Tex. Cr. Rep. 103, which case, in so far as it conflicts with this case, is overruled. In 1827 the law was laid down, in accord with the best authorities, that insanity resulting from long continued drunkenness is an excuse for crime; but insanity, the immediate result of intoxication, is not: *Cornwell v. State*, Mart. & Y. 147; *Bennett v. State*, Mart. & Y. 133. But in

1843, the court, in a murder case, laid down the doctrine in all its fullness: "That although drunkenness, in point of law, constitutes no excuse for crime, still, when the nature and essence of a crime are made by law to depend on the peculiar state of defendant's mind at the commission of the act, drunkenness is a proper subject of consideration. The question is, What is the mental *status* at the time of the act, and with reference to the act? This is not holding that drunkenness is an excuse, but it is an inquiry whether the very crime defined by law has been in fact committed. If the mental state required by law to constitute the crime be one of deliberation and premeditation, and drunkenness or other cause excludes the existence of such mental state, then the crime is not excused by the drunkenness or such other cause, but has not in fact been committed": *Swan v. State*, 4 Humph. 136. This reasoning authorized the introduction of drunkenness in any degree in all cases of crime.

But in 1849, in *Pirtle v. State*, 9 Humph. 663, the same court expressly asserted the common-law doctrine to be correct, and expressly limited the doctrine announced in Swan's case to murder cases only, and declared that this was only admitted in Tennessee because of the statute of that state dividing murder into two degrees; and also asserting that the drunkenness must be excessive, and that it can only be introduced to reduce the degree of murder, but not to make it manslaughter. But while the court adhered to common law, it also indulged in reflections that tend to sustain the propositions of the Swan case, and question the correctness of the common law: *State v. Cross*, 27 Mo. 332. In the following year the question came again before the Tennessee courts in the case of *Haile v. State*, 11 Humph. 154, and the court sustained the views announced in *Pirtle v. State*, 9 Humph. 663, but held that the degree of drunkenness which may be considered to shed light on the mental *status* need not be that excessive intoxication which renders a party incapable of a criminal intent, but that any state of drunkenness is ³²⁸ a proper subject of inquiry. So it appears that in Tennessee drunkenness to any extent is admissible only in murder cases, and for the sole purpose of reducing the crime, if at all, to murder in the second degree, but not to manslaughter or any lower degree of crime: *Cartwright v. State*, 8 Lea, 377. But the law laid down by the *Pirtle* case seems to have been the law in Texas prior to the statute, as declared by this court in

Colbath v. State, 4 Tex. App. 76, and in *McCarty v. State*, 4 Tex. App. 461. The statute is right in excluding mere drunkenness as evidence in criminal cases.

It is certainly difficult for an ordinary mind to understand how drunkenness is admissible to shed light on the mental status of the offender, and yet not mitigate his offense; how it may be a circumstance to be considered by the jury in determining the intent, and yet not be an excuse for crime, if taken into consideration at all. It is claimed there is no inconsistency, because intoxication simply goes to show that no crime has been committed. It would certainly seem that if no crime had been committed, it is immaterial whether defendant was drunk or sober. If all the facts in the case except the drunkenness show a crime was committed, yet the element of drunkenness changes the nature of the offense, and makes it nothing, then it must certainly excuse the crime. It unquestionably overturns the common-law doctrine; and the naked proposition, divested of its metaphysical distinctions and fine-spun explanations, is boldly asserted, that drunkenness can avoid moral and legal responsibility for crime.

Punishment of crime rests upon the theory that the criminal not only has possession of his will, but of the power to control it. It is upon this fact that human responsibility must rest. The drunkard does not lose the power to control his will unless unconscious, but he does lose the desire to do so. So all criminals become such, because they lose the desire to control their will; hence the necessity for the strong arm of the law to supply that missing incentive for good behavior which was lost by vicious indulgence.

It cannot be denied there is a great difference between a crime deliberately planned and executed by a sober, calculating criminal, and one hastily committed by one whose mind is clouded or infuriated by intoxication; but human laws are based upon considerations of public policy, and look rather to the maintenance of the social order and personal security of the citizen than to fine discriminations in the conduct of wrongdoers. Against the ordinary assassin or wrongdoer there may be some check; caution may ward off the crime, or innocence may escape its work; but the drunkard is dangerous to the innocent as well as to the most depraved: Wharton's Criminal Law, sec. 49.

But the statute of the state definitely settles this question, and this court is not at liberty to follow the reasoning under

which other courts ²²⁹ have drifted far away from the common law. Yet the statute, wisely conceding something to modern thought, permits the intoxicated person, when his intoxication is so excessive as to render such person unconscious that the act he is doing is wrong, and will subject him to punishment, to plead his condition; and if it appears the design to kill was not previously formed, or premeditated, or rising out of a previous difficulty, or from revenge, or executed with cool, deliberate, and passionless action indicating malice, but was the result of a sudden, rash, and unpremeditated design, springing out of inconsiderate or irrational action or excitement, and originating in a mind so inflamed by intoxicants as to be wholly incapable of reflection or self-control, the jury should find the defendant guilty of murder in the second degree, but nothing less; and may also reduce the penalty they would otherwise attach to the crime but for his condition. It is to be observed that it is only in murder cases he can plead temporary insanity as a reduction of the degree of the crime. In no other character of crime is it admissible to change its nature for want of constituent elements. It was so at common law. As Wharton says, "there was no denial of the fact of guilt."

Hence the court erred in not instructing the jury that if defendant, while temporarily insane, formed the design to slay Richter, and immediately carried his design into execution, they could take into consideration his condition, both in determining the degree of murder and in fixing the penalty to be assessed by them. The jury, without instruction, having found the offense to be murder in the second degree, may have found a lower penalty had they been so instructed.

The next question is, what does the statute mean by the term "temporary insanity?" Whatever be the form or cause of insanity, it is settled by all authorities that the law will not consider it in a criminal case unless it deprives a person of the capacity and power to distinguish between right and wrong as to the particular act charged as an offense. If a person has knowledge and consciousness that the act he is doing is wrong, and will deserve punishment, whatever be his mental or physical weakness, he is, in the eye of the law, of sound mind and memory, and consequently the subject of punishment. But if a person is incapable of having a knowledge and consciousness that the act he is doing is wrong and criminal and will subject him to punishment, he is insane, and not respon-

sible for crime committed by him: Willson's Criminal Statutes, sec. 81, and cases cited; *State v. Nixon*, 32 Kan. 205; 5 Lawson's Defenses to Crime, "Insanity," 231; Wharton and Stillé's Medical Jurisprudence, 45.

Though it is a general rule that insanity is an excuse for crime, there is one exception to the rule, and that is where the crime is committed by a party in a fit of recent intoxication, though the party is bereft of his reason by drunkenness, and therefore is insane as from any other cause. All authorities recognize drunkenness to be a species of insanity that may be ³²⁰ attended, when carried far enough, with loss of reason and self-control, while under the direct effects of the intoxicant; but this effect is voluntary and brought about by the acts of the party, and thereby differs from ordinary insanity, which is the act of Providence, and the sufferer is not responsible.

There are two kinds of insanity produced by alcoholism: 1. Delirium tremens, caused by the breaking down of the person's system by long continued or habitual drunkenness, and brought on by abstinence from drink. This is what is called "settled insanity," to distinguish it from "temporary insanity," or drunkenness, directly resulting from drink. "Settled insanity," from the earliest times, has been held to be a complete defense to crime. Lord Hale says: "If by means of drunkenness an habitual or fixed madness be caused, though contracted by the will of the party, it will excuse crime": Hale's Pleas of the Crown, pt. 1, c. 4. In *United States v. Drew*, 5 Mason, 28, decided in 1828, Story, J., says: "Insanity, whose remote cause is habitual drunkenness, is an excuse for crime committed by the party while so insane, but not intoxicated or under the influence of whisky. Such insanity has always been deemed a sufficient excuse for any crime done under its influence": *United States v. McGlue*, 1 Curt. 1; *Maconnehey v. State*, 5 Ohio St. 77; *Carter v. State*, 12 Tex. 500; 62 Am. Dec. 539; *Erwin v. State*, 10 Tex. App. 702. 2. The other kind of insanity is that condition of the mind directly produced by the use of ardent spirits; and where a fit of intoxication is carried to such a degree that the person becomes incapable of knowing the act he is doing is wrong and criminal, as above stated, he is in that condition referred to by the statute as being "temporarily insane," as stated by this court in *Kelley v. State*, 31 Tex. Cr. Rep. 216. There is no difference between the two kinds of insanity so

far as the mental *status* is concerned, but they differ widely in their causes and results. The first is from drinking as a remote result; the second from drinking as a direct result. The first is an involuntary result, from which all shrink alike; the second is voluntarily sought after. In the first, there is no criminal responsibility; but in the second, responsibility never ceases.

There is evidence only of temporary insanity in the record, and the court erred in not explaining temporary insanity to the jury, and also instructing them that if they believed that defendant was temporarily insane at the time he formed the intent to kill deceased, and the same was carried into execution while defendant was so insane, they should take such insanity into consideration, both in determining the degree and in reducing the penalty. For the errors indicated, the cause is reversed and remanded.

Reversed and remanded.

Judges all present and concurring.

HOMICIDE—MANSLAUGHTER.—Where a homicide is committed with a deadly weapon, provocation by words only, no matter how opprobrious, is not sufficient to reduce the crime from murder to manslaughter: *State v. Levell*, 34 S. C. 120; 27 Am. St. Rep. 799, and note with the cases collected. Mere words, however aggravating, are not considered sufficient provocation to reduce a killing from murder to manslaughter: *Levy v. State*, 28 Tex. App. 203; 19 Am. St. Rep. 826, and note.

INSANITY AS A DEFENSE TO CRIME.—This question is fully discussed in *State v. Levell*, 34 S. C. 120; 27 Am. St. Rep. 799, and note with the cases collected; extended note to *State v. Marler*, 36 Am. Dec. 402-411, and in *People v. McElvaine*, 125 N. Y. 597.

INTOXICATION AS A DEFENSE TO CRIME.—Voluntary intoxication does not excuse a criminal act; yet where a person is accused of a crime which can be committed only by doing a particular thing with a specific intent, it may be shown, in defense, that at the time of doing the act charged, the accused was so drunk that he could not have entertained the intent necessary to constitute the offense: *Chrisman v. State*, 54 Ark. 283; 26 Am. St. Rep. 44, and note; *Garner v. State*, 28 Fla. 113; 29 Am. St. Rep. 232, and note. See further the extended note to *Flanigan v. People*, 40 Am. Rep. 560-570, and the note to *Walker v. State*, 7 Am. St. Rep. 21.

WRIGHT v. STATE.

[31 TEXAS CRIMINAL REPORTS, 354.]

SEDUCTION—OFFER TO MARRY AS DEFENSE.—Up to the moment of conviction the defendant may make an offer in good faith to marry the prosecutrix. If such offer is declined by her, he is entitled to a dismissal of the charge under a statute which provides that if the parties marry each other at any time before the conviction of defendant, or if he in good faith offers to marry the female seduced, no prosecution shall take place, or if begun shall be dismissed.

SEDUCTION—MARRIAGE FOLLOWED BY DESERTION.—In cases of seduction the marriage of the parties during the trial of an indictment therefor, though followed by desertion on the part of the husband, is a defense to the indictment, as is also a *bona fide* offer of marriage by the party indicted.

SEDUCTION—OFFER OF MARRIAGE.—THE GOOD FAITH of a defendant on trial for seduction, who in open court offers to marry the prosecutrix then and there, the presiding judge to perform the ceremony, and produces a license authorizing the marriage, cannot be questioned by evidence that he had declared that he would not live with her if married to her. In such case the only test which can be made of his good faith is for the court to proceed to marry the parties, and if the prosecutrix persistently refuses to marry him, it is the duty of the court to dismiss the charge against him.

SEDUCTION—EVIDENCE—CORROBORATION OF PROSECUTRIX.—Corroborative evidence of seduction need not be direct and positive, nor such evidence as is sufficient to convict independent of that of the prosecutrix, but simply such facts or circumstances as tend to support her testimony, and shall satisfy the jury that she is worthy of credit.

R. H. Ward and J. G. Cook, for the appellant.

Hammond and Ballard, and R. L. Henry, assistant attorney general, for the state.

257 **SIMKINS, J.** Appellant was convicted of the offense of seduction, and his punishment assessed at four years in the penitentiary, from which he appeals.

There are only two questions that need be considered: 1. The defendant, when the evidence of the state was introduced, and before the court had charged the jury, and while the prosecutrix was on the stand, in the presence of the court and jury, in open court, holding a marriage license duly issued, stated to said prosecutrix that in good faith he then and there offered to marry her, and, if she would accept him, his honor then and there could marry them; that he held the marriage license in his hand authorizing the marriage rite. To this offer, before Miss Nisbitt could answer, the district attorney objected, and asked leave to contest the good faith of the offer.

Defendant objected to the contest on the ground that the only way to test his good faith was for Miss Nisbitt to have accepted his offer of marriage, and for the court to agree to perform the ceremony. The court overruled this objection, and allowed the district attorney to make the contest, who proved by several witnesses that defendant had said he would not marry Miss Nisbitt unless compelled to, and he would not live with her. Thereupon the defendant was duly sworn, and under oath, and with the license in his hand, again said to Miss Nisbitt that if she would marry him and live with him, that he would not only marry her, but would live with her, and to the best of his ability discharge all his marital duties towards her. Thereupon Miss Nisbitt said to defendant, "I most positively decline to marry you or to live with you. I would not marry any man who treated a woman as you have done me." Thereupon counsel moved to dismiss the prosecution and instruct the jury to acquit the defendant. The court declined, upon the ground that under the evidence he did not think that defendant intended in good faith to marry Miss Nisbitt and live with her. This testimony is fully set forth in a bill of exceptions. It is signed by the court, with the explanation that when the offer was made, the prosecuting witness, Miss Nisbitt, was silent; that it was then the district attorney proposed to test the question of good faith; that upon the introduction of the testimony the court said, "the parties may marry if they wish to do so," and Miss Nisbitt refused to consent, and the court ordered the trial to proceed.

Article 816 of the Penal Code declares that if the parties marry each other at any time before the conviction of defendant, or if the defendant in good faith offers to marry the female so seduced, no prosecution shall take ³⁵⁵ place, or if begun it shall be dismissed. The learned judge appears to have construed "the offer in good faith," spoken of in the statute, to require something more than a bare submission to the marriage rite; that in the "offer" of defendant must be included the promise to live with, protect, and support—in short, do a husband's part by the prosecutrix. Such, however, is not the statute. The law goes no further than the marriage vow; then it must leave the parties. When he marries her, in the language of olden times, "he makes an honest woman of her." He can marry no other woman during her life without a divorce. Mr. Wharton lays down the

rule correctly when he says the marriage of the parties subsequent to the seduction, though followed by the desertion of the husband, is a defense to an indictment for seduction, and so is a *bona fide* offer of marriage: 2 Wharton on Criminal Law, sec. 1760.

If the offer is made before prosecution begun, the grand jury should find no bill. After the prosecution is begun, and up to the moment of conviction, defendant may make his offer. As presented in the record, the defendant unquestionably made an offer of marriage to the prosecutrix, and it was sincerely made. In the presence of the whole court—judge, jury, and counsel, and the spectators—he offers to marry the prosecutrix then and there, and the presiding judge to perform the ceremony, and produces the license authorizing the marriage. Of his good faith there can be no earthly doubt. The penitentiary towering above him was the strongest guaranty of the sincerity of his offer. And the court erred in permitting the district attorney to question the *bona fides* of an offer that was patent to all. The only test that could have been made of his good faith would have been for the court to have proceeded to marry the parties as requested by the defendant, and if the prosecutrix declined to marry him, who was then and there willing to proceed, the court should have ordered the dismissal of the cause.

But again, after the district attorney was erroneously allowed to call in witnesses to prove the defendant's declarations that "he would not live a day with the prosecutrix; that it would break his mother's heart for him to marry her," the defendant caused himself to be duly sworn, and, under the sanction of an oath, again made his offer of marriage, promising to live with her and act as a true husband. But the prosecutrix peremptorily declined his offer. While it is true the oath could not have subjected defendant to the pains and penalties of perjury had he refused after marriage to live with her, still it was a strong and touching proof of the good faith and truth of defendant's offer. The court, on the refusal of prosecutrix, ordered the trial to proceed. The court again erred. The court should have warned her that defendant had done all that the law required, and her refusal of his offer would release him from all criminal liability, and, on her persistent refusal, should have dismissed the prosecution.

250 2. As to the sufficiency of the testimony, we think the witness is amply corroborated as to the promise of marriage

and the illicit intercourse. Corroborative evidence need not be direct and positive, or such evidence as is sufficient to convict, independent of that of the prosecutrix, but simply such facts or circumstances as tend to support her testimony, and shall satisfy the jury she is worthy of credit. And when there is other testimony fairly tending to support the prosecutrix upon facts essential to constitute the offense, it is for the jury to say whether she is corroborated: *State v. Timmens*, 4 Minn. 325. She testified she yielded to defendant because he faithfully promised to marry her. The witnesses prove that the young lady was highly esteemed, and visited by other young gentlemen, and moved in the best social circles, with a good reputation for chastity and virtue; that he was received by her family as a suitor, and was so persistent in his attentions, that all other gentlemen were compelled to cease attendance. His letters breathe undying affection and strong jealousy, and speak of their marriage in the future as a certainty. We think the evidence is amply sufficient to sustain proof of seduction. There is no other question that need be considered. For the error above indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

Judges all present and concurring.

CRIMINAL LAW—SEDUCTION—MARRIAGE OR OFFER TO MARRY AS A DEFENSE.—Where seduction is accomplished under promise of marriage, and the promise has been kept, no prosecution or conviction can be had after the marriage, and the question of good faith on the part of the man in entering into such marriage cannot affect the question of his guilt or innocence: *People v. Gould*, 70 Mich. 240; 14 Am. St. Rep. 493, and note; note to *State v. Carron*, 87 Am. Dec. 409; but under the Iowa code, section 3368, evidence that the defendant after the seduction offered to marry the prosecutrix is competent only as bearing on the question whether or not the alleged seduction was accomplished by means of a promise of marriage. Such offer of marriage, when not accepted by the prosecutrix, is no bar to the prosecution: *State v. Thompson*, 79 Iowa, 704.

SULLIVAN v. STATE.

[31 TEXAS CRIMINAL REPORTS, 486.]

ASSAULT WITH INTENT TO MURDER—EVIDENCE OF MALICE.—On prosecutions for assault with intent to murder, antecedent menaces, quarrels, grudges, or a previous attempt to kill the prosecuting witness, are admissible to throw light on the acts of the accused and to prove malice or motive.

SELF-DEFENSE—PROVOKING QUARREL.—A party charged with assault with intent to kill, who brought on and began the difficulty, cannot justify his attempt to kill on the ground of self-defense, and although he thus began the difficulty with no intent to kill or to do bodily injury, yet, if afterwards, he found it necessary to kill his opponent to save his own life, he cannot justify his act by claiming that it was done in self-defense.

ASSAULT WITH INTENT TO MURDER—SELF-DEFENSE—INSTRUCTIONS.—In a prosecution for assault with intent to murder, an instruction requested by the accused to the effect, that upon the question of self-defense the facts must be viewed from the standpoint of the accused, and if, when he shot, he had reason to believe that the prosecuting witness was about to shoot him, the jury must acquit, is properly qualified, by adding that if the accused brought on the difficulty he cannot claim self-defense, when such qualification is justified by the evidence.

Glass and Burges, for the appellant.

R. L. Henry, assistant attorney general, for the state.

488 **SIMKINS, J.** Appellant was indicted for an assault with intent to murder one T. G. Beaty, and was sentenced to two years in the state penitentiary, from which judgment he appeals.

1. Appellant complains that the court erred in allowing testimony of a previous difficulty between appellant and T. G. Beaty to be introduced upon the trial of this case. Antecedent menaces, quarrels, and grudges may always be shown to prove malice: *Anderson v. State*, 15 Tex. App. 447; *McKinney v. State*, 8 Tex. App. 626. The testimony of the former attempt upon the life of Beaty only the day before the present assault with intent to murder was committed, was certainly admissible to throw light on the acts of defendant, and prove motive: *Carr v. State*, 41 Tex. 543. There were no special charges asked, nor exceptions reserved to the general charge for not limiting the effect of the testimony to the proof of motive only, and we cannot see how any injury was caused by the failure of the court so to charge, as we see no reason for believing the defendant was convicted for the first assault.

2. The appellant complains the court erred in using the expression in his charge, that "if the jury believed that defendant sought Beaty for the purpose of bringing on a difficulty," without explaining what kind of a difficulty. While it may not be clear what point is referred to in the expression "but upon this point," yet we think the proposition contained in the charge is not only correct, but applicable. The court, in substance, charged, that if defendant brought on and began the difficulty, he could not justify his attempt to kill Beaty on the ground of self-defense; for although defendant began the difficulty, with no intent to kill or to do bodily injury to Beaty, yet, if afterwards, in the course of the difficulty, he found it necessary to kill him to save his own life, he cannot justify his act by claiming it was done in self-defense: *White v. State*, 23 Tex. App. 154; *Lilly v. State*, 20 Tex. App. 1; *Thuston v. State*, 21 Tex. App. 245; *Gilleland v. State*, 44 Tex. 356.

3. Neither do we see any error in the qualification of the special charge asked by the appellant. The court, at the instance of defendant, charged the jury, that upon the question of self-defense the facts must be viewed from defendant's standpoint and if, when defendant shot, he had reason ⁴⁸⁹ to believe Beaty was about to shoot him, the jury should acquit. The court properly qualified this charge by adding that it was to be considered in connection with subdivision 2 of the charge referred to above, to the effect that if defendant brought on the difficulty, he could not claim self-defense.

4. Appellant claims that the evidence is insufficient to support the verdict. We cannot agree to this view of the case. The record shows that appellant was the aggressor all through the difficulty, which seems to have continued for several days. When he saw Beaty sitting with his gun upon the wagon he rode back on no peaceful mission. True, he was singing, but was armed for the fight. Claiming that Beaty had changed the position of his gun, which Beaty denied and disclaimed, he leaped from his horse, and, drawing his pistol, told him to come from behind the wagon and he would fill him with shot; and the fight began, both parties firing. While Beaty was fixing his gun, which had hung fire, appellant remounted, and rode close up to him and fired. The evidence, we think, is sufficient to sustain the verdict, and the judgment is affirmed.

Affirmed.

Judges all present and concurring.

MALICE—PROOF OF.—Malice is inferential, and may be inferred from the attendant and surrounding circumstances, in conjunction with all previous occurrences having reference to and connected with the commission of the crime: *Walker v. State*, 85 Ala. 7; 7 Am. St. Rep. 17, and note. Evidence of a former difficulty and of threats made in connection therewith are admissible on the part of the prosecution in a trial for murder: *Stitt v. State*, 91 Ala. 10; 24 Am. St. Rep. 853, and note. That threats are evidence of malice and ill-will see *Palmer v. People*, 138 Ill. 356; 32 Am. St. Rep. 146, and note, and *Commonwealth v. Holmes*, 157 Mass. 233; 34 Am. St. Rep. 270, and note.

SELF-DEFENSE BY ONE WHO PROVOKED DIFFICULTY.—When the defendant provokes the occasion which produces the necessity to take the life of the deceased he cannot rely upon self-defense: *Levy v. State*, 28 Tex. App. 203; 19 Am. St. Rep. 826, and note; *Brown v. State*, 83 Ala. 33; 3 Am. St. Rep. 685, and note; *Mealy v. State*, 26 Tex. App. 274; 8 Am. St. Rep. 477, and note. See the note to *People v. Lennon*, 15 Am. St. Rep. 262.

WEATHERFORD v. STATE.

[31 TEXAS CRIMINAL REPORTS, 530.]

DE FACTO OFFICER IS ONE WHO ACTS under color of a known and valid appointment, but has failed to conform to some precedent requirement, as to take an oath, give a bond, or the like.

DE FACTO OFFICERS HAVE AUTHORITY TO PREVENT OPEN VIOLATIONS OF LAW committed in their presence by arresting the parties guilty of such violations, and they also have authority to summon citizens to aid them in making such arrests.

DE FACTO OFFICERS—RIGHTS OF PARTY SUMMONED TO ASSIST IN MAKING ARREST.—A citizen summoned by a known *de facto* officer to assist in arresting a person guilty of an open violation of law in their presence, is justified in obeying the summons and in the discharge of the duty thus imposed upon him, does not act at his own peril because of the defective deputation or nonrecord of the officer's right or title to his office.

MURDER—ARREST BY CITIZEN SUMMONED BY DE FACTO OFFICER.—A citizen summoned by a known *de facto* officer, to assist him in making an arrest of a person guilty of an open violation of law in their presence, is justified in attempting to make the arrest in good faith, and if killed by the offender while so acting in an orderly manner, the crime can be no less than murder.

VERDICT—AFFIDAVIT OF JURORS TO IMPEACH.—No affidavit, deposition, or other sworn statement of a juror can be received to impeach or explain a verdict, or to show on what ground it was rendered.

PRACTICE—IMPROPER ARGUMENT—REVERSIBLE ERROR.—Remarks by a prosecuting attorney in his closing argument in a criminal case to the effect that one of the jurors had forsworn himself in order to hang the jury, whether true or false, are prejudicial to the rights of the accused, and are grounds for a reversal of a verdict of conviction.

Stephen P. West, L. F. Chester, and Gordon Bullitt, for the appellant.

R. L. Henry, assistant attorney general, for the state.

⁵³⁴ **SIMKINS, J.** Appellant was convicted of murder in the second degree, and his punishment assessed at twenty-five years in the penitentiary, from which judgment he appeals to this court.

The appellant was at the depot in the town of Hyatt, with a six-shooter, making a negro dance, when one Edwards, acting as deputy sheriff, summoned the deceased, Jack Bowers, to assist him in disarming the defendant. The officer demanded his pistol, but he refused to give it up, and when Edwards advanced on him, he shot Bowers in the stomach, who died next day. He also shot Edwards, and attempted to shoot him a second time in the head, but the pistol snapped. He then beat Edwards in the head with the pistol, and escaped. On the trial the appellant questioned the validity of Edwards' appointment. Edwards testified, without objection, that he had been acting four or five months as deputy sheriff, under written appointment from Ensloe, the sheriff of Tyler county, and he had recorded his oath of office, but not his appointment. It is also ⁵³⁵ shown that appellant was aware that Edwards was acting as such deputy. Conceding that Edwards was not an officer *de jure*, it is clearly shown he was an officer *de facto*: Bishop's Criminal Law, sec. 464; Bishop's Criminal Procedure, 185, 186. Lord Ellenborough, adopting Lord Holt's definition, declared a *de facto* officer to be one who has the reputation of being the officer, and yet is not a good officer in point of law: *Rex v. Corp. of Bedford Level*, 6 East, 356. In *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, the supreme court of Connecticut, in an elaborate opinion, held, a *de facto* officer is one who acts under color of a known and valid appointment, but has failed to conform to some precedent requirement, as to take an oath, give a bond, or the like. Such is the holding in Texas: *Cox v. Houston etc. Ry. Co.*, 68 Tex. 230; *Thompson v. Johnson*, 84 Tex. 548; *McKinney v. O'Connor*, 26 Tex. 14. And so in other states: *Petersilea v. Stone*, 119 Mass. 465; 20 Am. Rep. 335; *Town of Plymouth v. Painter*, 17 Conn. 585; 44 Am. Dec. 574; *Rice v. Commonwealth*, 8 Bush, 14; *Brown v. Lunt*, 37 Me. 423; *Gregg v. Jamison*, 55 Pa. St. 468; *Commissioners v. McDaniel*, 7 Jones, 107; *Peoples v. White*, 24 Wend. 539.

In the case of *Margate Pier Co. v. Hannam* (decided in 1833), 3 Barn. & Ald. 266, it was held, that a justice's acts were valid as to third persons, though he had not taken the oath which the statute made a condition precedent to his right to act as such, and the same principle applies in respect to ministerial officers: *Lisbon v. Bow*, 10 N. H. 167; *Merrill v. Palmer*, 13 N. H. 184. In *State v. Dierberger*, 90 Mo. 369, where the constitution of Missouri requires all officers, before entering on the duties of their office, to take and subscribe an oath to support the constitution, and faithfully demean themselves in office, and a deputy constable acted without taking the oath, it was held he was an officer *de facto*. If Edwards was an officer *de facto*, and he summoned deceased, John Bowers, to his assistance in arresting appellant, Bowers was justifiable in obeying him: Bishop's Criminal Law, sec. 464; *Watson v. State*, 83 Ala. 60. The evidence clearly shows a violation of law in the presence of the officer, who, believing it was his duty to arrest defendant, proceeded to do so, summoning deceased to assist him. Deceased was unarmed, and so was Edwards. It was shown that appellant was making a negro dance, by aiming a pistol at his feet. Some of the witnesses speak of him "as having fun with the negro," but such amusement certainly demanded the interposition of the law. Appellant knew he was violating the law. He was told by Edwards that it was his duty to arrest him. He knew that he was in no danger of his life, or of serious bodily injury, yet he deliberately killed the deceased, and attempted to kill Edwards, to avoid being disarmed, although believing Edwards to be an officer of the law.

Appellant insists the court should have charged the crime would be no higher than manslaughter, as the arrest was illegal. In *Miller v. State* (Tex. Crim. App., Jan. 21, 1893), 536 this court lays down the doctrine that even in illegal arrests of an ordinary character the killing may be done under such circumstances of deliberation or cruelty as will render it murder upon express malice. But the record here shows that Bowers was killed in the discharge of duty as a citizen of this state. It surely cannot be maintained that citizens who are summoned to assist known and recognized officers in the discharge of their duties act at their own peril in case of the defective or nonrecord of the deputation of the officer: Pen. Code, art. 46; Bishop's Criminal Procedure, sec. 186.

The court charged the jury that the arrest was illegal. The

court should have charged the jury, that if the said Edwards was known and recognized in the community as deputy sheriff, and said Bowers was summoned by said officer to assist, and in good faith attempted the arrest of appellant, he would have been justifiable in making the arrest, and if appellant shot him while so acting in an orderly manner, it could not be less than murder. The special charges asked were not the law.

But appellant insists that the case should be reversed because the district attorney, in his closing speech before the jury, stated that he was informed that appellant had succeeded in getting one of his friends on the jury; that one of the jurors had gone upon the jury to hang it, and had so stated just before he was impaneled; that the juror had his mind made up when he swore on his *voir dire* that he had formed no opinion; that he, the district attorney, only had eleven men to speak to, as the other juror was there to hang the jury.

The appellant also introduced the affidavits of two jurors, who stated that the charge made by the district attorney influenced the jury, and that they were mad about it, and that affiants were induced to vote for a verdict of twenty-five years when they thought that five years was sufficient. Upon grounds of public policy, courts have almost universally agreed upon the rule, that no affidavit, deposition, or other sworn statement of a juror, will be received to impeach a verdict, or to explain it, or to show on what grounds it was rendered (2 Thompson's Trials, sec. 2618, and authorities cited); and the wisdom of the rule needs no argument to support it. We cannot notice the affidavits filed in this cause, showing that the appellant received a higher punishment than two of the jurors would have agreed to if they had not been provoked by the language of the district attorney. As to the charge itself made by the district attorney, which was reiterated over the objections of the defendant, and unchecked by the court, we think that, whether it was true or false, it was wrong in the district attorney to make it. The trial judge should of his own accord have promptly stopped him.

In the closing argument of the case, where the proof was very strong against the man on trial for his life, and when he had no chance to reply or deny it, to publicly charge that he was so conscious of his guilt that ⁵²⁷ he had stocked the jury to defeat justice, must have affected most injuriously the

rights of appellant. Jurors disposed to be lenient may have surrendered their conviction of right under an apprehension of being suspected as the juror denounced by the district attorney. If the district attorney was in possession of facts justifying such a charge, he should have caused the arrest of the juror for perjury as soon as the jury was discharged from the case, and secured his conviction, irrespective of the question "how he voted." If the charge was false, then unquestionably it was calculated to injure appellant: Willson's Criminal Statutes, sec. 2321.

For the remarks of the district attorney the judgment must be reversed; but in reversing the case, we desire to call the attention of the trial court to the omission of the charge under the statute, that the jury are the exclusive judges of the facts proved and the weight to be given to the testimony: Code Crim. Proc., art. 728.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

Judges all present and concurring.

OFFICERS DE FACTO—WHO ARE.—An officer *de facto* is one who is in actual possession of an office under color or claim of an appointment or election, and is in the exercise of its functions and the discharge of its duties: *Waterman v. Chicago etc. R. R. Co.*, 139 Ill. 658; 32 Am. St. Rep. 228, and note; *Hamlin v. Kassaffer*, 15 Or. 456; 3 Am. St. Rep. 176, and note; *Creighton v. Commonwealth*, 83 Ky. 142; 4 Am. St. Rep. 143, and note. See, also, the extended notes to *Smith v. Bondurant*, 58 Am. Rep. 440, and *Hildreth v. McIntire*, 19 Am. Dec. 63-69.

OFFICERS DE FACTO—BINDING EFFECT OF ACTS OF.—An officer justifying an act done officially must aver and prove that he was an officer duly commissioned and qualified; but third persons are required to show only that he was an officer *de facto*: *Schlenker v. Risley*, 3 Scam. 483; 38 Am. Dec. 100, and note; *Hardesty v. Taft*, 23 Md. 513; 87 Am. Dec. 584, and note. When an office has been duly created, public policy often requires that the official acts of the person discharging the duties thereof shall not be questioned on the ground that he has no title to the office: *Gorman v. People*, 17 Col. 596; 31 Am. St. Rep. 350, and note. The acts of officers *de facto* are valid when they concern the public, or the rights of strangers and third persons who have an interest in the acts done: *King v. Philadelphia Co.*, 154 Pa. St. 160; 35 Am. St. Rep. 817, and note; *Magneau v. City of Fremont*, 30 Neb. 843; 27 Am. St. Rep. 436, and note; *Gorman v. People*, 17 Col. 596; 31 Am. St. Rep. 350, and note; note to *Hildreth v. McIntire*, 19 Am. Dec. 68. See, also, the extended note to *Kelly v. Bemis*, 64 Am. Dec. 54.

TRIAL—IMPEACHMENT OF VERDICT BY AFFIDAVIT OF JUROR.—Affidavits of jurymen cannot be received to impeach their verdict: *Palmer v. People*, 138 Ill. 356; 32 Am. St. Rep. 146; *Knowlton v. McMahon*, 13 Minn. 386; 97 Am. Dec. 236, and note; *Forester v. Guard, Breese*, 74; 12 Am. Dec. 141, and note. The oath of the jurors that they misunderstood the instructions

of the court may be received in support of an affidavit setting forth that fact: *Packard v. United States*, 1 G. Greene, 225; 48 Am. Dec. 375, and extended note. The affidavit of a juror is admissible to impeach a verdict obtained by a resort to unjust or unreasonable methods: *Elledge v. Todd*, 1 Humph. 43; 34 Am. Dec. 616, and note. The affidavits of jurors who tried a criminal case will be received upon a motion for new trial to prove facts which will vitiate their verdict: *Crawford v. State*, 2 Yerg. 60; 24 Am. Dec. 467, and extended note. See, also, the note to *Warner v. Robinson*, 1 Am. Dec. 28.

APPEAL.—IMPROPER ARGUMENT BY STATE'S ATTORNEY AS GROUND FOR A REVERSAL OF JUDGMENT: *Palmer v. People*, 138 Ill. 356; 32 Am. St. Rep. 146, and note; *Rahn v. State*, 30 Tex. App. 310; 28 Am. St. Rep. 911, and note. See further discussions of this subject in the extended notes to *McConnell v. State*, 58 Am. Rep. 648; *Martin v. State*, 56 Am. Rep. 814, and *Cleveland Paper Co. v. Banks*, 48 Am. Rep. 336.

PRINDLE v. STATE.

[51 TEXAS CRIMINAL REPORTS, 551.]

SODOMY.—To CONSTITUTE CRIME OF SODOMY the act must be in that part of the body where sodomy is usually committed. The act in a child's mouth does not constitute the crime.

R. L. Henry, assistant attorney general, for the state.

551 DAVIDSON, J. Appellant was convicted of sodomy, and prosecutes this appeal.

"This offense consists in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman; or by man or woman, in any manner, with beast": 1 Russell on Crimes, 937.

Sodomy, which "is the abominable and detestable crime against nature," known to the common law, is, by article 342 of the Penal Code, made an "offense" in this state; and being undefined, we must look to the common law for the elements of this crime: *Ex Parte Bergen*, 14 Tex. App. 52. "To constitute this offense, the act must be in that part where sodomy is usually committed. The act in a child's mouth does not constitute the offense": 1 Russell on Crimes, 937; *Rex v. Jacobs*, Russ. & R. C. C. 381.

The evidence discloses the act relied on in this case was committed in a child's mouth. However vile and detestable the act proved may be, and is, it can constitute no offense, because not contemplated by the statute, and is not embraced in the crime of sodomy.

The legislature has not named or defined any crime under
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which defendant can be prosecuted or punished, under the evidence adduced in this case. The judgment is reversed, and the cause remanded.

Reversed and remanded.

HURT, P. J., concurs. SIMKINS, J., absent.

SODOMY—WHAT CONSTITUTES THE OFFENSE.—Sodomy is carnal knowledge against the order of nature by a man with a man, or in the same manner with a woman, or by man or woman in any manner with a beast; See 1 Bishop's Criminal Law, 7th ed., sec. 503; 1 Russell on Crimes, 6th Am. ed., 698. See, also, Wharton's Criminal Law, 8th ed., sec. 579.

MROUS v. STATE.

(21 TEXAS CRIMINAL REPORTS, 697.)

STATUTES—EX POST FACTO LAW—EVIDENCE OF PROSECUTRIX IN SEDUCTION.—A statute which enlarges the class of persons who may be competent to testify as witnesses is not *ex post facto* in its relation to offenses previously committed. Hence on a trial for seduction committed before the passage of a statute permitting the seduced female to testify she is properly permitted to give her testimony.

SEDUCTION—UNCHASTITY AS DEFENSE.—A man who, knowing the unchaste reputation of a female in the community, promises to marry her, and subsequently has sexual intercourse with her by virtue of such promise, may avail himself of the character of the woman for want of chastity as a defense to an indictment for her seduction, whatever his liability may be for breach of promise of marriage.

SEDUCTION—UNCHASTITY AS DEFENSE.—A promise to marry and carnal knowledge of a woman may exist without seduction, and when a woman has lost her virtue and reputation for chastity, and the promise of marriage only induces a change of lovers, the promisor is not guilty of seduction, no matter what his civil liability may be for a breach of the promise of marriage.

Jay Minter and George C. Altgelt, for the appellant.

R. L. Henry, assistant attorney general, for the state.

599 **SIMKINS, J.** Appellant was convicted of the seduction, under promise of marriage, of one Tina Gorzell, and sentenced to a fine of two thousand dollars, from which he appeals to this court.

1. Appellant complains that the court erred in permitting the prosecutrix to testify, because the crime, if any, occurred before the 14th of July, 1891, at which time the act took effect permitting the seduced female to testify, and the action of the court above stated was retroactive and *ex post facto* in

its nature, in violation of the constitution. Of course it is not contended that the crime itself is thereby changed or aggravated, or a greater punishment inflicted. The only ground upon which the objection is based is, that it required less evidence to convict by permitting the seduced woman to testify. If this is true, it would be *ex post facto*: *Calder v. Bull*, 3 Dall. 389; *Murray v. State*, 1 Tex. App. 428; *Holt v. State*, 2 Tex. 363; *Dawson v. State*, 6 Tex. 347.

It is certainly difficult to understand how opening new sources of light, ~~see~~ or increasing the means of proving or detecting crime, can be said to require less evidence, or become *ex post facto*. In *Hopt v. Utah*, 110 U. S. 574, the supreme court of the United States declared a statute which enlarges the class of persons who may be competent as witnesses not *ex post facto* in its application to offenses previously committed. It does not attach criminality to any act previously done, aggravate past crimes, or increase punishment therefor; nor does it alter the degree or lessen the amount or measure of the proof necessary for conviction. Removing restrictions upon the competency of certain classes of persons as witnesses relates to modes of procedure only in which no one can be said to have a vested right, and which the state, on grounds of public policy, may regulate at pleasure: *Laughlin v. Commonwealth*, 18 Bush, 261. The objection is not well taken.

2. The appellant objects to the charge of the court to the effect that if the jury believe that defendant and Tina Gorzell were well acquainted with each other, and the defendant, knowing the character of the said Tina Gorzell in the community, promised to marry her, and subsequently seduced her by virtue of said promise, he cannot now avail himself of the character of the woman for want of chastity as a defense.

In *Putman v. State*, 29 Tex. App. 457, 25 Am. St. Rep. 788, it seems to be held, that, under the Penal Code, article 814, there must be three concurring facts to constitute the crime of seduction as punishable by law: 1. A promise to marry; 2. Seduction; and 3. Carnal knowledge. Whether or not there can be such a thing as seduction without carnal knowledge, as asserted in the opinion, we think it is clear there can be a promise to marry and carnal knowledge without seduction; and that is when a woman has already lost her virtue and reputation, and the promise of marriage only induces a change of lovers whether the promisor knew it or not. The

evidence shows that for four years past the reputation of the prosecutrix for chastity has been bad; that before appellant's promise of marriage was made she was generous and promiscuous in her favors; and specific acts were proved. If this testimony be true, appellant could not be guilty of seduction, whatever may have been his civil liability for breach of promise. Because the court erred in its charge as to the law, the judgment is reversed, and the cause remanded.

Reversed and remanded.

Judges all present and concurring.

STATUTES—EX POST FACTO LAW.—EVIDENCE: See *People v. Hayes*, 149 N. Y. 484, *ante*, p. 572, and extended note.

SEDUCTION—WANT OF CHASTITY OF PROSECUTRIX AS A DEFENSE.—In order to convict a defendant charged with the crime of seducing an unmarried female of previously chaste character under promise of marriage it is necessary for the prosecution to prove that the person seduced was an "unmarried female of previous chaste character": *People v. Krusick*, 93 Cal. 74. An instruction in a prosecution for seduction that before the jury could find the defendant guilty they must find that the prosecutrix was, at the time of the alleged seduction, an unmarried woman "of previous chaste character" was held correct: *State v. Gunagy*, 84 Iowa, 177. On a trial for seduction evidence of previous acts of lewdness and unchastity with other men by the complainant is admissible for the defense: *State v. Patterson*, 88 Me. 88; 57 Am. Rep. 374. For a further discussion of this subject see the notes to the following cases: *Weaver v. Bachert*, 44 Am. Dec. 171; *People v. De Fore*, 8 Am. St. Rep. 871; *Kenyon v. People*, 84 Am. Dec. 182; *State v. Carron*, 87 Am. Dec. 406; and *Andre v. State*, 68 Am. Dec. 714.

MILLER v. STATE.

[81 TEXAS CRIMINAL REPORTS, 609.]

APPELLATE PRACTICE—CHANGE OF VENUE—An order denying an application for a change of venue cannot be considered on appeal unless the facts upon which the order was based are presented in a bill of exceptions. This rule is not altered by attaching to the application for a change of venue a newspaper account of the action of a mob which sought to take the accused from custody for the purpose of hanging him.

PRACTICE—CONTINUANCE—ABSENCE OF WITNESS.—An application for a continuance on account of the absence of a witness should not be granted unless the application shows diligence to secure the attendance of the witness, and states definitely the facts expected to be proved by him.

EVIDENCE WHICH IS ADMISSIBLE AS TENDING TO MAINTAIN THE THEORY OF DEFENSE in a criminal case, if offered by it for that purpose, is not rendered incompetent because offered by the prosecution.

EVIDENCE IMPROPERLY ADMITTED—EFFECT OF WITHDRAWAL OF.—The effect of withdrawing and excluding evidence erroneously admitted, and

which may have been prejudicial in its nature and tendency, is to cure the error, unless such evidence is of such a prejudicial character as to so influence the jury against the defendant that he would be deprived of a fair and impartial trial.

MURDER—EVIDENCE OF MALICE AND MOTIVE.—On a trial for the murder of a policeman, a statement made by the accused three weeks previous to the homicide, while speaking of his previous arrests by the deceased and other policemen, to the effect that in case he was arrested again, and was not allowed to give bail and had a gun with him the fight would begin right there, is admissible in evidence on the issue of malice and motive.

MURDER—DECLARATIONS BY ACCUSED AS PART OF RES GESTÆ.—A request or declaration made to a third party by a person under arrest for murder, within fifteen minutes after the homicide and upon being informed of his victim's death, to "tell my brother to come down here; by God, I have got my man!" is part of the *res gestæ*, and admissible in evidence as such.

SELF-DEFENSE—RIGHT TO RESIST ILLEGAL ARREST.—A person illegally arrested and detained may, in a proper manner, regain his liberty, and a killing under such circumstances may be reduced to manslaughter or self-defense. But if the killing be for any other cause, as ill-will or malice, it is murder; or if more force than necessary be used, or a deadly weapon be resorted to unnecessarily in the first instance by the arrested party, this constitutes him the aggressor, and makes the killing murder.

SELF-DEFENSE—ILLEGAL ARREST—RIGHT TO RESIST.—A person is not required to submit to illegal arrest but may demand the warrant or proper authority, and in its absence repel force by force, provided, the force does not exceed prevention and defense. The right to repel force by force, continues until the person attempting the illegal arrest presses forward with such violence, that the person defending is obliged to choose between three things—to retreat, to surrender, or the death of his adversary. If the force used is disproportionate to the injury about to be inflicted, self-defense is eliminated, and if it is attributed to any other cause than resistance to the illegal arrest, such arrest cannot be a mitigating circumstance.

MANSLAUGHTER—RESISTANCE TO ILLEGAL ARREST.—An illegal arrest is deemed in law a great provocation, and, if conceded, to constitute adequate cause yet to reduce a killing in resisting such arrest to manslaughter, sudden passion must have existed in the mind of the slayer at the time of the homicide, otherwise the killing is murder. In such case adequate cause and sudden passion must concur.

MURDER—RESISTING ILLEGAL ARREST—UNKNOWN PROVOCATION.—The existence of an unknown provocation to the accused, as that the warrant for his arrest is illegal, at the time he kills an officer while resisting arrest, is not sufficient to reduce the homicide below murder.

MURDER—RESISTANCE TO ARREST.—A person expecting an attempt will be made to arrest him either legally or illegally, who deliberately prepares arms for immediate use, and calmly and deliberately threatens and determines to kill the person making such arrest unless bail is immediately accorded him, and who does kill the arresting officer when bail is refused, and when he is in no danger from any source, is guilty of killing with express malice, and the homicide is murder in the first degree.

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J. C. Kearby, Bassett, Seay and Muse, and S. H. Russell, for the appellant.

R. L. Henry, assistant attorney general, for the state.

624 DAVIDSON, J. Appellant prosecutes this appeal from a conviction of murder in the first degree, with the death penalty assessed.

1. When the cause was called for trial he applied for a change of venue, based upon both grounds mentioned in the statute. To this application was attached an exhibit—a newspaper account of the actions of a mob which sought to take defendant from custody for the purpose of hanging him. The controverting affidavit filed by the state was sufficient, both 625 as to form and substance; wherefore the court did not err in overruling defendant's exceptions to the same: Willson's Criminal Statutes, secs. 2209, 2210. The application was refused, and defendant excepted, but the evidence adduced on the trial of the issues involved in the motion is not incorporated in the bill of exceptions; and it is therefore insufficient to authorize, on appeal, a revision of this ruling of the court: Code Crim. Proc., art. 584; *Blackwell v. State*, 29 Tex. App. 194; *Lacy v. State*, 30 Tex. App. 119. Attaching the newspaper account to the application as an exhibit does not authorize its consideration as evidence in support of such application: *Lacy v. State*, 30 Tex. App. 119.

2. Defendant sought a continuance: 1. Because there existed a prejudice so great and a combination of influential persons so strong, that he could not obtain a fair and impartial trial in Dallas county; and 2. For the testimony of one Brown, by whom he "expected to prove, that a few nights prior to the homicide several policemen with others came to his house in the city of Dallas, and then and there talked with said Brown, and inquired of said witness the whereabouts of defendant, and said they proposed to arrest defendant, and that he would then be killed by some man who they then named to said witness." The application fails to show diligence to secure the attendance of the witness. Defendant was served with a copy of the indictment on June 9th, and his trial occurred July 14th following. The process for the witness is not attached to the motion, nor is it inserted in the bill of exceptions, and neither states the date of its issuance, nor is it shown that further process was not required. But if diligence be conceded, the allegations are too vague and in-

definite. Neither the name of defendant's proposed slayer, nor that of any of the parties who visited his house, is given. Nor would the testimony as set out be admissible. General statements will not suffice, nor will mere inferences or indefinite allegations. The facts expected to be proved must be stated definitely: *Miller v. State* (Tex. Crim. App., Jan. 21, 1893); *Williams v. State*, 10 Tex. App. 114; *Grissom v. State*, 8 Tex. App. 386; *Thomas v. State*, 17 Tex. App. 437; *Mitchell v. State*, 1 Tex. App. 195.

3. This homicide occurred on May 24th. The state, over defendant's objection, was permitted to prove that an affidavit was prepared on May 23d, and filed on May 25th, charging defendant with the offense of slander; that the acting chief of police was informed of that fact; that he instructed the police force to arrest defendant; that, in obedience to this order, he was arrested, and this constituted the only authority for his arrest. This testimony was objected to, because irrelevant and incompetent. The effect of this testimony was to show the arrest without warrant, and thus it tended to maintain the defensive theory of illegal arrest, and for this purpose was legitimate, and did not, because offered by the prosecution, become incompetent.

4. The affidavit charging defendant with the offense of slander was also admitted in evidence. The slander charged imputed to the female mentioned a want of chastity of a most revolting nature. The contents were hardly germane to any issue in the case, in the absence of evidence bringing home knowledge to defendant of the existence of the affidavit, and we are not prepared to say that it may not have prejudiced defendant in the minds of the jury. The court, however, subsequently withdrew the affidavit from the consideration of the jury, and instructed them verbally, as well as in writing, to disregard it as evidence in the case.

The effect of withdrawing and excluding testimony erroneously admitted, which was or may have been prejudicial in its nature and tendency, has been the subject of much discussion in the courts, and the decisions are not harmonious upon the question. The weight of authority, however, seems to be that such withdrawal cures the error, and such has been the opinion entertained by this court: *Sutton v. State*, 2 Tex. App. 342; *Marshall v. State*, 5 Tex. App. 278; *Phillips v. State*, 22 Tex. App. 139; *Nalley v. State*, 28 Tex. App. 387. See, also,

State v. Towler, 13 R. I. 661; Thompson on Trials, secs. 715, 722, 723, and notes.

In *Sutton v. State*, 2 Tèx. App. 342, it was said: "But conceding the court erred in admitting this testimony, the error, if in fact any was committed, was corrected by the court afterwards withdrawing it from the consideration of the jury." This ruling has been approved in subsequent cases, and the doctrine uniformly upheld, that when improper evidence has been admitted over objection, it is the proper practice, and may become the duty of the court, to exclude or withdraw it from the jury, and instruct them to disregard it in finding their verdict. Authorities above cited: Willson's Criminal Statutes, sec. 2514.

To hold otherwise would be to sanction the doctrine that the court could not cure any error into which it may have fallen by mistake or inadvertence, and thus render it helpless to rectify errors committed, and the trial a mockery and a farce. We cannot sanction such a doctrine. It is not intended here to hold that cases may not arise in which the withdrawal of testimony would not cure the error committed in admitting same; for it may occur that such evidence was of such a prejudicial character as to so influence the jury against the defendant that he would be deprived of a fair and impartial trial. We do not think, however, this evidence of that character.

5. The state proved by Arnold, that about three weeks prior to the killing, defendant, speaking of his previous arrests by deceased and other policemen, said "that every officer who gave him bond or took his recognizance, it was all right, and he would be there the next morning; but if he would not be allowed to give bond, and had a gun with him, he would ^{be} damned if the fight did n't begin right there. He made similar statements to me repeatedly in the past year." Objections were urged that this testimony was irrelevant, showed no malice towards deceased, and tended to confuse and mislead the jury. Deceased was a policeman, was specially mentioned by defendant in connection with his previous arrests and conditional threats, was connected with the arrest of defendant just preceding the homicide, and was seeking his arrest at the time he was shot and killed. The evidence was directly pertinent to the issue of malice and motive: *Campbell v. State*, 15 Tex. App. 506; *McKinney v. State*, 8 Tex.

App. 626; *Hubby v. State*, 8 Tex. App. 597; Willson's Criminal Statutes, secs. 1043, 1044.

6. While under arrest, and within fifteen minutes after the homicide, being informed of Brewer's death, defendant told some one in the crowd near him to "tell Sam Miller to come down here; by God, I have got my man!" It was objected that defendant was under arrest, was not cautioned or warned, and was in fear of his life. The testimony was *res gestæ*, and properly admitted: *Lewis v. State*, 29 Tex. App. 201; 25 Am. St. Rep. 720; *Fulcher v. State*, 28 Tex. App. 465; *Castillo v. State*, 31 Tex. Cr. Rep. 145; *ante*, p. 794; *Powers v. State*, 23 Tex. App. 42.

7. Error is assigned because the court charged the jury as to the law applicable to murder in the first and second degrees, and refused to confine their consideration of the case to the issues of self-defense and manslaughter. In this connection the evidence discloses that defendant, about three weeks prior to the homicide, and on several previous occasions, alluding to his "many arrests," said that deceased and other policemen had given him bail, but if, upon future arrests, they should refuse to take his bond or recognizance, he would have his pistol, and "he would be damned if a fight did not commence, and he would never be carried to the jail alive." When arrested at the railroad depot, shortly before the homicide, he assented and willingly accompanied the officers to Lacy's saloon, on the opposite side of the street. Deceased participated in this arrest, but did not accompany the parties to the saloon, and was not further connected with his detention. While in the saloon, Beard, one of the policemen making the arrest, having telephoned for the patrol wagon, refused defendant's request for bail because he "did not know exactly what the charge against him was, and Ed Cornwell (chief of police) had told him to bring him to the police station," and also said to defendant, "Go and see Ed, and it will be all right."

Anticipating no trouble, Beard left the defendant in the saloon, in the custody of another policeman, Brandenburg, who, upon two similar requests, refused to release defendant on bond. Upon the last refusal, and while Brandenburg was engaged in conversation with another party, defendant drew his pistol, leveled it at the officer's face, remarking, as he did so, "By God, here's my bond!" or "By God, I will have bond!" ⁶³⁸ and jumped or backed out of one door as the offi-

cer went out of another. Just as they emerged from the doors defendant shot at Brandenburg, who then drew his pistol. Defendant began retreating and firing, and as he fired the third shot, Brandenburg fired at him. After the firing began, deceased, who was standing some distance away, started in pursuit of defendant for the purpose of arresting him, and as he approached, defendant turned upon, and, supporting his right arm with his left, fired at and killed him. He then continued to retreat and shoot at Brandenburg until his pistol was entirely discharged. In a few moments he was arrested, and from him was taken a pistol and twenty-two cartridges, with six of which he was seeking to reload his pistol. Deceased's pistol was discharged as he fell or was falling, and the evidence is conflicting as to whether he fired at defendant prior to being shot. Shortly after his arrest, upon being informed of Brewer's death, defendant said to a bystander, "Tell Sam Miller to come down here; by God, I have got my man!" Sam Miller and defendant are brothers. The evening train had just arrived, and was at the depot. The street was filled with people, and the firing occurred near the depot, one ball striking the engine.

Where a party is illegally detained he may, in a proper manner, regain his liberty, and a killing under such circumstances may be reduced to manslaughter or self-defense. But if the killing be for any other cause, as ill-will or malice, it will be murder; or if more force than necessary be used, or a deadly weapon be resorted to unnecessarily, in the first instance, by the arresting party, this would constitute him the aggressor: Code Crim. Proc., arts. 83, 84; *Stockton v. State*, 25 Tex. 776. If his intention was to kill, or do serious bodily harm, the killing would be upon express malice. He is not required to submit to illegal arrest, but may demand the warrant or proper authority, and in its absence repel force by force, provided the force does not exceed prevention and defense. Such force, however, cannot be disproportionate to the injury. The right to repel force by force continues until the person attempting the illegal arrest presses forward with such violence that the person defending is obliged to choose between three things: to retreat, to surrender, or the death of his adversary. If the force used be disproportionate to the injury about to be inflicted, self-defense is eliminated; and if it be attributed to any other cause than resistance to the illegal arrest, such arrest cannot be looked to as a mitigating

circumstance. It has been said that "in such cases it may be well deserving of consideration whether the first inquiry ought not to be whether the act done was caused by illegal apprehension. If the act done arose from other causes, and had no reference to the illegal arrest—as if it arose from previous ill-will—it would seem that the illegality of the arrest ought not to be taken into consideration, because it was not the cause of the act, and therefore could not be truly said to have offered any provocation for it": 1 Am. & Eng. Ency. of Law, 573, and notes. See, also, *Ex parte Sherwood*, 29 Tex. App. 334; *Miller v. State*, Tex. Crim. App., Jan. 21, 1893.

The question at last is, what cause, reason, or motive actuated the defendant in committing the homicide? It is the settled law of this state, that in arriving at a correct conclusion in homicide cases, the killing should be viewed from the defendant's standpoint; that is, to ascertain as nearly as possible, from the evidence, the reasons and motives which moved or induced the accused to do the killing. It has been held, that an unlawful arrest is esteemed, in law, a great provocation. If it be conceded that such provocation constitutes "adequate cause," under our statute, then, in order to reduce the killing to manslaughter, "sudden passion" must have existed in the mind of the slayer at the time of the homicide; otherwise, the killing would be murder: *Massie v. State*, 30 Tex. App. 64; *Ex Parte Jones*, 31 Tex. Cr. Rep. 422; *Ex Parte Sherwood*, 29 Tex. App. 334; *Miller v. State*, Tex. Cr. App., Jan. 21, 1893. Such provocation, in the absence of "sudden passion," may become evidence of a most cogent character and force, showing malice. (Same authorities.) Again, if there exists a provocation unknown to the accused at the time of the homicide, this would not suffice to reduce the killing below murder. There must be a concurrence of "adequate cause" and "sudden passion," as defined by our statute, to reduce a felonious homicide to the degree of manslaughter.

As was said by Judge Hurt in *Dyson v. State*, 14 Tex. App. 454: "When the prisoners have been some time in custody, and the informality of the warrant under which they were held was unknown to them, and they deliberately planned and carried out an attack which resulted in the death of one of the officers, this was held murder, and not manslaughter." And again, in *Ex Parte Sherwood*, 29 Tex. App. 334: "Be-

cause, without such knowledge, the provocation could have no effect upon him whatever, and hence, without such knowledge, it is absolutely certain that his passions, if any, were not caused by this provocation." This court has further held, that where a party, "expecting an attempt will be made to arrest him illegally, deliberately prepares arms for immediate use, and calmly and deliberately determines to kill the person attempting the illegal arrest, and upon his appearance for that purpose does kill him, such killing would be upon express malice; and to hold the slayer guilty upon express malice would not only be law, but common sense and justice": *Miller v. State*, Tex. Cr. App., Jan. 1893. Illegal or attempted illegal arrest, unlawful restraint of liberty, and a wanton, unnecessary, and unjustifiable exercise of legal power in making arrest, stand upon the same legal plane: *Ex Parte Sherwood*, 29 Tex. App. 334; *Miller v. State*, Tex. Cr. App., Jan. 1893; *Horrigan & Thompson's Cases on Self-defense*, 715.

640 In this case defendant had been "many times" arrested by deceased and other policemen of Dallas, had always submitted, because bail was accorded, and would do so again upon the same conditions, but should this be refused, he had deliberately resolved, and so notified the officer, to bring on a deadly conflict, and one in which his own or the life of the officer was to be sacrificed. In this connection, and upon this stated condition, the life of deceased had been threatened by defendant; and when the opportunity came he was armed, and brought about the conflict. The drawing and presenting his pistol was an unnecessary and an illegal act, and disclosed his purpose to execute his previous threat. He was in no danger from the officers, or any other source, and could have secured bail by accompanying the officers to the police station. Deceased was not connected with the difficulty in the saloon, and was seeking defendant's arrest when shot and killed by him. Defendant was violating the law of the state in carrying the pistol, presenting it, and shooting at Brandenburg, as well as subsequently firing it in the street; and he was aware that it was incumbent upon deceased, as an officer, to arrest him for these offenses, and a duty which if left unperformed would subject the officer to a heavy penalty and a severe punishment.

But there seems to have been another reason operating upon defendant's mind, inciting him to take the life of Brewer, as evidenced by the deliberate manner of shooting him, as well

as the message sent his brother immediately after the homicide. That message conveys the idea that deceased had been the subject of discussion between the brothers; that they understood each other in regard to defendant's feelings and intentions toward deceased; and the inference is strong, if not conclusive, that the brother would know, without mentioning his name, that deceased was the "man" referred to in the message. The evidence does not sustain the position that defendant knew he was illegally arrested, nor was that matter ever referred to by him. He voluntarily and willingly submitted to the arrest, said it was "all right," and at no time questioned the officers' right to make the arrest, nor demanded their authority for doing so, but only claimed the right to give bond, and thus not only recognized their right to make the arrest, but manifested as well his belief that his arrest was legal. His mind was unmoved by reason of the arrest. He believed it legal, and willingly remained in custody for ten or fifteen minutes, and until bail was refused the third time; and, reviewing his acts in the light of all the facts, he did so, waiting for the opportune moment to shoot, either because he was denied bail on the spot, at the instant, and on the terms fixed by himself (not because he was refused bail at all events), or because there existed in his mind a purpose to kill, formed prior to the arrest, as indicated by the facts anterior to, occurring at the time of, and subsequent to, the homicide. Being the aggressor, he brought on a conflict in which he knew or believed life must be sacrificed,⁶⁴¹ and from that instant till the firing ceased his attitude in the difficulty never changed.

Viewing this transaction from the defendant's standpoint, as evinced by his acts and declarations, it appears that he had frequently been arrested by deceased and other policemen; that he had heretofore been admitted to bail; that he anticipated refusal of bail, if again arrested; that he threatened to be armed, and bring on a combat with deadly weapons, in case he was not permitted to give bond when arrested; that the legality or illegality of the anticipated arrest had no connection with his threats; that he assented to his arrest, and did not inquire the cause, or demand the authority of the officers making it; that he deliberately armed himself with a heavy caliber pistol, as he had threatened; that he also secured and carried about his person twenty-two extra cartridges; that thus armed, he went to the place at which

deceased and the other policemen were on duty on the occasion of the homicide; that he was immediately arrested by the policemen; that he demanded, and was refused, bail shortly after his arrest; that he drew his pistol and fired at Brandenburg when bail was refused; that he turned from firing at Brandenburg and fired at deceased; that he was deliberate in his manner of shooting at and killing deceased; that he sent the message: "Tell Sam Miller to come down here; by God, I have got my man!" to his brother, just after the homicide; that he had prior unkind feelings and ill-will towards deceased; and that he was reckless and desperate of human life in his conduct throughout the difficulty. The court, therefore, did not err in charging the law applicable to murder of both degrees, and in refusing to confine and restrict the deliberations of the jury to manslaughter and self-defense.

We deem it unnecessary to discuss the other questions relating to the charge. Under the principles announced in the cases of *Ex parte Sherwood*, 29 Tex. App. 334, and *Miller v. State*, Tex. Cr. App., Jan. 1893, above cited, we are of opinion that the judgment should be affirmed, and it is so ordered.

Affirmed.

SIMKINS, J., concurs. HURT, P. J., dissents.

CONTINUANCE—ABSENCE OF WITNESS—AFFIDAVIT.—To entitle a person to a continuance of a trial on the ground of absence of witnesses he must satisfy the court that he has been guilty of no laches or neglect in attempting to procure their attendance: *Hyde v. State*, 16 Tex. 445; 67 Am. Dec. 630; *Hensley v. Lytle*, 5 Tex. 497; 55 Am. Dec. 741, and note; *Wall v. State*, 18 Tex. 682; 70 Am. Dec. 302. The continuance of a cause will not be granted, unless the party seeking it makes oath that due diligence has been used: *Thompson v. Mississippi Marine etc. Ins. Co.*, 2 La. 228; 22 Am. Dec. 129. An affidavit for a continuance in Iowa must contain, among other things, the facts showing due diligence to obtain the witness or his testimony: *State v. Sharpe*, 16 Iowa, 36; 85 Am. Dec. 435. See further on this subject the extended notes to *Stevenson v. Sherwood*, 74 Am. Dec. 145, where the question is thoroughly discussed.

APPEAL—EFFECT OF WITHDRAWING IMPROPERLY ADMITTED EVIDENCE.—If a court instructs a jury to disregard evidence which has been received against objection and exception, the exception is thereby vitiated, and the error in admitting the evidence is not available on appeal: *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 45; 30 Am. St. Rep. 23.

HOMICIDE—EVIDENCE OF MALICE—THREATS.—Evidence of a former trouble and threats made in connection therewith are admissible on the part of the prosecution, though the particulars of the difficulty are not: *Scott v. State*, 91 Ala. 10; 24 Am. St. Rep. 853, and note. Menaces may be proved against a person charged with the murder of the person menaced: *Dunn v. State*, ?

Ark. 229; 35 Am. Dec. 54; *Palmer v. People*, 133 Ill. 356; 32 Am. St. Rep. 146, and note. See, also, the notes to *People v. Campbell*, 43 Am. Rep. 262; *Fields v. State*, 11 Am. Rep. 776, and *Garner v. State*, 29 Am. St. Rep. 256.

HOMICIDE—RESISTING UNLAWFUL ARREST AS A DEFENSE.—A person illegally restrained of his liberty may not only oppose force to force, but can increase that force to the killing of his adversary, if necessary, to prevent the attempted wrong, and such killing is reduced to manslaughter: *Maully v. State*, 26 Tex. App. 274; 8 Am. St. Rep. 477; *Jones v. State*, 26 Tex. App. 1; 8 Am. St. Rep. 454, and note. A person may rightfully resist the attempt of another to enter his house for the purpose of illegally arresting him; and if such resistance by lawful means results in the death of the assailant, it is excusable homicide; if by unlawful means, but without malice, it is manslaughter: *State v. Scheels*, 57 Conn. 307; 14 Am. St. Rep. 106, and note with the cases collected. See, also, the following cases and the notes thereto: *Commonwealth v. Wright*, 158 Mass. 149; 35 Am. St. Rep. 476; *Palmer v. People*, 133 Ill. 356; 32 Am. St. Rep. 146; *Croom v. State*, 85 Ga. 718; 21 Am. St. Rep. 176, and *Creighton v. Commonwealth*, 83 Ky. 142; 4 Am. St. Rep. 142.

CASES

IN THE

SUPREME COURT

OF

VIRGINIA.

THOMAS' ADMINISTRATOR v. LEWIS.

[80 VIRGINIA, 1.]

GIFT CAUSA MORTIS.—If a man, then dangerously ill, calls his daughter, saying to her, "Look in my pockets, and bring me my keys, my purse, and the package of papers tied with a string," and, upon their being brought by her, says: "I am going to give you these things as yours," also gives her the keys to a bureau drawer, and tells her that in it she will find two notes, and to take them out, and that they are hers, and, taking out of his purse some keys, says, "Here are my keys to my safe and a box I have in the vault at the bank; whatever you find in the safe and the vault at the bank you may have as yours, and do not let anyone get those keys away from you by any pretence," and also taking the package of papers tied with a string, says, "In this package you will find my bank book. Whatever it calls for is yours, and in the package you will also find some notes; you can have them also," and on the next day, on finding that she did not put the things where he told her, he made her bring them into his presence, and explained to her their importance, and the importance of her doing with them as he had directed, and again said, "They are yours, and you will have to take care of them," and calling a person present, said to her, "Fanny, you see me give Bettie these things," this is a good gift *causa mortis* of the property to the daughter Bettie, excepting the money represented by the bank book, and includes, with this exception, all the notes, bonds, and choses in action either then present, or contained in the safe or box referred to by the donor.

EVIDENCE.—THE DECLARATION OF AN ALLEGED DONOR OF A GIFT CAUSA MORTIS, made while the donor is still alive, to the effect that the gift had been made by him to her, is admissible in evidence in her favor to rebut other testimony tending to prove that at a later day she did not claim the making of such gift.

A GIFT CAUSA MORTIS MAY BE OF ANY AMOUNT OF PROPERTY, and is not required to be made in the presence of any stated number of witnesses. **IN CASE OF A GIFT CAUSA MORTIS, A DELIVERY,** while essential, may be either actual or constructive. A constructive delivery is always suff-

cient when manual delivery is either impracticable or inconvenient. The delivery of keys of a safe or box is sufficient constructive delivery of possession of its contents, though another person has a duplicate set of keys thereto.

GIFTS CAUSA MORTIS.—The fact that the donor, in making the gift, tells the donee that the property is to be hers in case of his death does not make the gift testamentary and invalid because not executed in the form essential to a will.

GIFTS CAUSA MORTIS.—THE STATUTE OF VIRGINIA providing that if the donor and the donee reside together at the time of the gift, the possession of the latter at their place of residence is not a sufficient possession to support the gift, does not apply to gifts *causa mortis*.

A GIFT CAUSA MORTIS OF A BANK BOOK showing the amount on deposit by the donor is not a sufficient gift of the fund so deposited.

SUIT by Bettie Thomas Lewis and her husband against W. R. Quarles and Mann S. Quarles, curators of the estate of William R. Thomas, deceased, and Legh R. Page, administrator of such estate, to recover the entire personal property of the estate. The claim of the complainants was founded upon an alleged gift *causa mortis*. The chancery court of the city of Richmond, before which the suit was tried, gave its decree in favor of the complainants, except as to the sum of eighteen thousand dollars, money on deposit in the Planters' National Bank. The administrator appealed.

W. R. Staples, B. B. Munford, M. M. Gilliam, and G. W. Hansbrough, for the appellant.

Edmund Waddill, Jr., Christian and Christian, Edgar Allan, W. W. Gordon, and E. C. Burks, for the appellees.

26 FAUNTLEROY, J. The petition of Legh R. Page, administrator of William A. Thomas, deceased, represents that on the 4th of January, 1889, the said William A. Thomas died intestate, leaving an estate valued at some two hundred and twenty-five thousand dollars of which some twenty thousand dollars was realty, eighteen thousand dollars on deposit in the Planters' National Bank of Richmond, and the balance represented by bonds, stocks, choses in action, and gold coin, deposited in a rented box in the vaults of the said bank. That on the fourteenth day of January, 1889, the county court of Henrico county, on the motion of the heirs at law of the said decedent, appointed William R. Quarles, and Mann S. Quarles curators of the said estate, who immediately qualified as such, by giving bond in the penalty of three hundred thousand dollars, and entered upon the discharge of their duties. That on the twenty-ninth day of January, 1889, Bettie Lewis, along

with her husband, filed her bill in the chancery court of the city of Richmond against the aforesaid curators, in which she asserted that said William A. Thomas, deceased, during his last illness, by gift *causa mortis*, gave her the keys to the tin box in the vault of the Planters' National Bank above described, and with them all the property contained therein; that he gave her the pass book, showing the *status* of his account with said Planters' ²⁷ Bank for money placed on deposit therein, and with it gave to her the balance on deposit to his credit in said bank, amounting, as aforesaid, to some eighteen thousand dollars; and that he also gave to her several negotiable notes, aggregating less than one thousand dollars, which he had with him at his residence at the time of his last illness. That to this bill the curators filed their joint demurrer and answer, denying the claim asserted by said Bettie Lewis; denying that said Thomas had attempted during his last illness to make a gift to the plaintiff of said property, and insisting that actual possession of the several subjects of this pretended donation had never come to or remained with the plaintiff; and that no possession, either actual or constructive, by her, at the joint residence of the donor and donee could render valid the alleged gift, the same not being evidenced by deed or will. That on the nineteenth day of February, 1889, petitioner, Legh R. Page was appointed administrator of the estate of said William A. Thomas, deceased, by the county court of Henrico county; and as such he filed his answer to the bill of said Bettie Lewis.

Before the assets in the hands of the curators aforesaid could be turned over to petitioner, the chancery court of the city of Richmond, on the motion of Bettie Lewis, appointed N. W. Bowe and J. A. Coke receivers to take charge of and hold all of the aforesaid assets, pending a decision of the questions raised by the suit aforesaid. After the appointment of the aforesaid receivers, depositions were taken by both plaintiff and defendants, and the case made ready for a hearing at the June term, 1890, of the chancery court. The cause was argued elaborately and exhaustively before the Hon. E. H. Fitzhugh, the judge of the said court. No decree was, however, rendered by him, he having unexpectedly and suddenly died before the next term of his court. The Hon. W. J. Leake, having been appointed his successor, the cause was again argued at great length before him, and on the eighth ²⁸ day of January, 1891, a decree was pronounced by him,

sustaining the claim of the said Bettie Lewis (as preferred in her bill) to all the personal estate of the said William A. Thomas, deceased, except the sum of eighteen thousand dollars, money on deposit in the Planters' National Bank, which was awarded to petitioner, as administrator aforesaid. From this decree the case is here on appeal.

The question raised in the controversy and to be decided by this court is, what constitutes a valid gift *mortis causa*; and whether the evidence adduced by the complainant comes up to the law's requirements to establish such a gift by the decedent, William A. Thomas, to the complainant, Bettie Thomas Lewis, by and through the facts and circumstances detailed in the bill and attested by the proofs?

It is essential to a correct and just estimate of the facts of the case, as disclosed by the record, that they be viewed in the light of the history and relations of the parties to the controversy, the congruities of the case, and the legal weight of the testimony.

Bettie Thomas Lewis, who, before her marriage, was Bettie Thomas, is the only living child of the late William A. Thomas, a wealthy retired merchant, who, at the age of seventy years, and enfeebled by long sickness, departed this life, intestate, on the fourth day of January, 1889, at his residence in or near to the city of Richmond, possessed of a large estate of both real and personal property, but principally personalty. He never married, but cohabited with a woman of half-white blood, formerly his slave, in the county of Pittsylvania, Virginia, by whom he was the father of two daughters, Bettie, and an older sister, Fannie, who married, and died soon after the late civil war without issue. Bettie, thirty-five years of age when her father died, and Fannie, were always recognized and acknowledged by William A. Thomas as his children; they called him father, and he called them and cherished ^{so} and lived with them as his children.

The death of Fannie was a great grief to him; and after that event his whole and devoted affection was centered upon Bettie as the "daughter of his heart and house," whom he loved "passing well," and from whom he was never thereafter separated, except for the two years that he sent her to a boarding-school. Soon after the termination of the late war he removed to Richmond to engage in business, and he purchased a small farm just outside the city limits for a home for himself and Bettie, and there they lived together for more

than twenty years, she presiding at his table and over his household affairs, and ministering to him in sickness and in health, nursing and caring for him with the constant assiduities of a devoted and dutiful daughter, and he providing for her comfort and pleasure in every conceivable form that lavish parental love and large means could suggest. He built the house in which they lived for her; and according to her directions, he planned and furnished it. He occupied a room intercommunicating with Bettie's; and during his long and languishing age, enfeebled by sickness and suffering, he preferred and tolerated no ministry but hers to his wants and his weariness. He provided for her an intelligent, agreeable female living companion in his house until her marriage to John H. Lewis; and for many years previous and up to his death, Fannie Coles, an educated intellectual woman—the natural and recognized daughter of the late John S. Coles, of Albemarle county—was her household companion, friend, and room-mate. He urged Bettie to make a trip to Europe with him; and for eight or ten summers next before his death he visited Saratoga Springs, taking with him Bettie and Fannie Coles, and there, as at his own home, sitting and eating with them at the same table. For Bettie's mother he provided a home, where for a long time she lived; but this he sold, and at the time of his death she lived at his house with Bettie, though the proof in the ⁴⁰ record is that he did not, of late years of his life, cohabit with her. William A. Thomas is represented, by the witnesses of the appellants, as a man honest, just, close to his interests, unusually prudent, and of fine business capacity, simple and frugal in his habits. He is described by the witness, Dr. H. McGuire, who was his attending physician, chosen friend, and adviser, as "a peculiar character, anyhow. I think, too, he had some little superstition about making his will. I think it was a dislike that belongs to a great many men to provide for death in any way." This "peculiar character, anyhow," cut off from social intercourse by the kind and circumstance of his household affinities, lived, insulated in his own home, almost absolutely without social recognition or intercourse. He had a few business friends, and no enemies. He had no relations of legal blood, except some collateral kindred who had never visited him in health or in sickness, and whom he knew of only by the importunity of occasional begging letters, of which he complained as an annoyance, saying: "Here is a begging let-

ter. The only use my relatives have for me is to get all out of me they can; but if they expect to get what I have when I die they will be mistaken." Dr. McGuire says: "From some things he said to me, I don't know what, I had an idea that he did not like his relatives, for I sometimes used these facts in urging him to make his will."

Mr. A. Judson Watkins, an adverse witness (whose acts and *animus*, bearing upon this contest over William A. Thomas' dying dispositions, will be the subject of analysis further on in this opinion), says: "I had a conversation with him (Mr. Thomas) on Wednesday evening (he died on Friday), which was the last I had, of about an hour's duration. I had frequently talked with him, and persuaded him, with all the power that was in me, not to neglect further providing for Bettie if he so intended." . . . "He did refer to Mr. Haxall's will, and I think he said, in course of conversation, ⁴¹ that he was very feeble, and that he wanted to see me especially in regard to making some monied arrangement. And, furthermore, I think I remarked to him: 'If you were to die without a will the lawyers and others [what others?] will get the most you have.' He followed me to the door and said to me: 'I am going to make everything all right.'" He did die, forty-eight hours after that interview, without a will; and whatever may be the ultimate issue of the contest made by "the others" over William A. Thomas' large estate, the event will fully verify the other branch of Mr. Watkins' warning prediction.

Mrs. Sarah Phillips, a neighbor who lived the length of two city squares, and for twenty-one or twenty-two years, near Mr. Thomas, and who had been employed by him to teach his daughter, Bettie, and who says that she saw a great deal of both of them, often and intimately, says: "I never heard him refer to his relations but once. He said that he had lately gotten a letter from one of them; that he knew, from the style it was written in, what he wanted, and that was money; that he never answered that letter, but rather shoved it off in the waste-basket; that he (Thomas) had had to look out for himself since he was very young, and that others might do the same."

Mrs. Mary F. Boyd, a near neighbor and intimate of Mr. Thomas and his family for fifteen years before his death, whose husband, as a merchant, had business and personal relations with him, says: "I heard Mr. Thomas say, conversing with

her husband about the property, 'Oh, William! I have bought all my relatives off.'"

Mr. Stephen B. Hughes, the most intimate and trusted friend of Mr. Thomas, says: "I have known Mr. Thomas since 1850. We lived together in the same store for many years, occupied the same room together, and were partners in business for about three years. And these friendly relations ^{as} continued up to the time of his death." This witness with very much other testimony equally important in its bearing upon the relations and affection existing between Mr. Thomas and his daughter Bettie, says they were "of the most affectionate nature—that of father and daughter. I have been present when Mr. Thomas was sick, and I have seen for myself. When Thomas was sick he usually sent for me. I was, several years ago, sent for to see Mr. Thomas. I found Thomas, as I thought, quite sick, and I asked Thomas to allow me to send him a trained nurse, and he said 'No'; that he preferred Bettie to anybody else. It was during that sickness that Thomas first told me that Bettie was his daughter. It was during that spell of sickness that Thomas told me, at his death, Bettie Lewis would be amply provided for. Some three or four summers ago, when Mr. Thomas was making his arrangements to go to Saratoga, I told him that I did not think he ought to venture so far from home, as feeble as he was, without having some one to care for him that he could rely on; and he told me that he was going to take Bettie with him; that he would rely on her sooner than anyone else. During his last spell of sickness Mr. Thomas frequently told me of her kindness and attention, and believed, but for her, he would not have lived to have gotten back from Saratoga. Mr. Thomas told me that he was very feeble; his appetite was poor, and he would rather be there with Bettie, because she knew better how to care for him than anyone else. He got me to go and buy a trunk for her, and had her name marked on it."

After stating that he had heard Mr. Thomas speak more than once, of his intention to provide amply for Bettie at his death, he said: "She was the only one I ever heard him say he was going to make provision for. Thomas used to get his mail at our store, and I have heard Thomas remark, 'Here's a begging letter,' or 'Another begging letter,' and the only ^{as} use his relations had for him was to get all out of him they

could; but if they expected to get **what he had** when he died that they would be mistaken."

Fannie Coles, who was the bedroom companion of his daughter Bettie, and an inmate of his home and confidence for many years previous and up to his death, says that she never knew any of his relatives to be at his house, but did remember his handing to Bettie a begging letter, which he thought he had put in the waste-basket at Drewry's, but afterwards found a part of it in his pocket. She also remembered another begging letter (Exhibit "A"), as to which she says: "I have heard Mr. Thomas tell Bettie about this letter, and he took it and gave it to her, and told her he had nothing to send them, and that he had given them all he expected to give them long years ago. And she said: 'Don't be so hard on the poor thing!' And he said to her: 'Bettie, if I left you alone, you and I would both go to the poorhouse together, because there is no end to your giving, and I am not going to give them a cent.'"

There is in the record very much more testimony, equally strong, explicit, unimpeached, and uncontradicted, attesting the lifelong, avowed, and unwavering solicitude and purpose of this isolated old man to nourish tenderly while he lived, and to provide for amply at his death, his devoted and faithful daughter Bettie—the only light of his long life, and the only love which quickened the emotions of his introverted and self-centered soul.

There is no particle of evidence—and none could be adduced by the appellants, aided by the direction of able, accomplished, and assiduous counsel, and prompted by the large stake of the controversy—to prove that William A. Thomas ever declared or intimated an intention to provide for any of his collateral kindred at all; much less to allow them to take and enjoy the acquisitions of his long life of industry, thrift, frugality, ⁴⁴ and self-denial. But, while we are asked to deny judicial credence to the clearest, the most consistent and convincing testimony that this dying and devoted father did give, with all due and legal solemnities, the larger portion—not all—of his property to his only child and darling daughter, we are deliberately invoked to infer (without the slightest evidence to warrant the deduction, and in disregard of full, incontrovertible proof to the contrary) that it was William A. Thomas' dying design to leave his beloved only child in des-

titution and disappointed helplessness; and to involve, by the statute of distributions, his whole estate upon collateral kindred with whom he had no intercourse, and for whom he cared nothing—strangers, absolutely, to his heart and his home. And the only inducement urged for this illogical and unwarranted inference is the circumstance that Mr. Thomas had the portrait of B. F. Gravely, who had married Mr. Thomas' cousin; and that in a letter of condolence, dated March 2, 1882, in reply to a letter announcing the death of B. F. Gravely, he expressed kindly regard, and asked Mr. Gravely's son, "Can I do anything for the family?" The inference is that he did then give them aid; and to this he doubtless had reference when he declared (as detailed in the evidence of Stephen B. Hughes, Fannie Coles, Mrs. Boyd, and sundry others) that he had given to them, long years ago, all he intended ever to give to them.

We have given this unavoidably long narrative of the relations, circumstances, congruities, and situation of the parties to this cause to show that the avowed and constant object of Mr. Thomas' life, labor, and love was solicitude and provision for his daughter Bettie; and that there is not one scintilla of proof in the record that, through all the years of his life, and in all the references he ever made to his intended disposition of his property, he ever had in his heart or mind a purpose to provide particularly for any other than his cherished child, to ⁴⁵ whom he was bound by the strongest ties of nature and affection; to whom he owed the undivided obligation of a father; and whose whole tenor of life, as shown by the record in this case, from her birth to the moment of his death, was an unvarying demonstration of dutiful devotion and filial confidence and affection. During the long years of his declining health and "cold gradations of decay" there was no planning or plotting after property in her heavy heart; but, reposing in childlike confidence and disinterested trust in the love of her father, Dr. McGuire says that when repeatedly warned and advised by him (as often he had urged upon her father on all the occasions of his critical illness) that if he should die without a will the law would deprive her of everything, "she always seemed rather indifferent about it, and was always more concerned about his health than his money!"

The *factum* of the gift depends mainly upon the testimony of Fannie Coles, detailing the circumstances, actions, and accompanying statements of Mr. Thomas during the period of

impending dissolution; and if that testimony be credible, consistent, uncontradicted, and corroborated by concomitant circumstance, it establishes, by legal and sufficient evidence, the gift, as a valid donation *mortis causa*, by William A. Thomas to the claimant, his daughter, Bettie Lewis. Her testimony is very voluminous, and we will state only so much of it as is necessary to the conclusion. She was subjected to the ordeal of four hundred and thirty-three searching questions and answers, and to a cross-examination, of many days, by a powerful array of practiced, skillful, able, and accomplished counsel for contestants—a fiery furnace of trial and a labyrinth of entanglement, through which she (nor any other human intelligence) could not have passed successfully, without the panoply of conscious truth and the thread of absolute consistency.

Bettie Lewis went upon the witness-stand, and offered to undergo the same process; but the appellants peremptorily ⁴⁶ refused to let her testify; when, well they and their astute counsel knew that if (as argued and insisted now) there was a collusion of untruth and fraud between Fannie Coles and her, all that was necessary to catch and convict them was to let them both testify.

On Thursday, the third day of January, 1889, William A. Thomas was taken seriously ill, and he died in the early part of the night of Friday—the next day. It was during that illness that he made to his daughter, Bettie, the gift which is the subject of controversy in this case, and to which the chancery court of the city of Richmond, upon the evidence adduced, has solemnly adjudged she is entitled by law.

The witness, Fannie Coles, says: "Mr. Thomas called Bettie to his bedside and said: 'Bettie, I am a very sick man. I do not know what may happen.' And he said, 'Bettie, look into my pants pocket, and bring me my keys, my penknives, my two purses; and look in the inside of my vest pocket and bring me a package of papers tied with a red string.' She brought them to his bed to him, and he said, 'Bettie, I am going to give you these things as yours.' He gave her the keys to his top bureau drawer, and told her that in that drawer she would find two notes in a white envelope; to get these notes out of the drawer; that they were hers. Then he opened a small black purse, and took out a small package of white tissue paper. Out of this paper he took some keys, and he said: 'Bettie, here are the keys to my safe at Drewry &

Co's and to the box I have in the vault of the bank.' He says: 'At Drewry & Co's, in the safe, you will not find anything of any great value, but whatever you find in that safe you can have. Now, Bettie, these keys that I now give you that belong to the box in the vault at the bank is where all my valuables are. Whatever you find in that box you can have as yours; and Bettie, whatever you do, don't let anyone get these keys away from you on any pretense. Swing ⁴⁷ on to them as you would your life.' Then he took up his pocket-book and gave it to her, and told her it had no great amount in the pocketbook, but that it was hers. Then he took up the package of papers that was tied with a red string, and he said: 'Bettie, in this package you will find my bank book, showing you how much I have in bank; whatever it calls for you can have as yours, and in this package also you will find some notes. They will be money for you; you can have them also. Bettie, I wish you to take these papers, my purses, and my knives—I give you these knives also—and put them in your trunk. I don't want you to put them in my bureau, but put them between your clothes for safekeeping, for, Bettie, you will have to take care of these things now. I have been taking care of them all these years for you.' "

As to what occurred on the afternoon of Friday, the next day, after Mr. Gilliam left, the witness further testified: "I went upstairs after seeing the gentleman (Mr. Gilliam) out, that Dr. McGuire sent up, and knocked at Mr. Thomas' door. Mr. Thomas spoke and said, 'Come in, Fannie,' and said, 'Take a seat.' I said, 'No, sir, I thank you; I don't care about sitting down.' He said, 'Fannie, take that chair there by the table.' I said, 'No, sir; I don't care about sitting down.' He said, 'Take that seat,' and I sat down. In a minute or so a servant knocked at the door and said, 'Miss Bettie, I have everything all ready for you now.' Bettie said to him: 'Father, won't you have some lunch now? It is time you were eating something, as the doctor said you must eat all you can.' She turned to me and said, 'Fannie, go downstairs and bring something nice up here for father's lunch.' He turned to me and said, 'Fannie, keep your seat until I tell you to go'; and he said to Bettie, 'I have something more important to do than to eat, now.' Then he said to Bettie, 'Where are those things I gave you last night?' and he said, ⁴⁸ 'I hope you have got them where I told you to put them, safe under lock and key.' Bettie told him, 'Yes,

air, she had; they were safe.' And he asked, 'Where were they?' and she told him they were safe. And he told her to go and get them and bring them to him. She turned to get them, and instead of putting them in her trunk, where he had told her the night before, she had dropped them in his bureau drawer. And he got very angry with her for putting them in his bureau drawer, and he said to her, 'Look here, now, Bettie, you had better do as I tell you about these things I have given you, for your very life hangs on them, and the bread you eat.' Bettie brought the things and laid them on the table in front of him, and he turned to her and he said, 'Bettie, where is that white envelope with those two notes in it; get it out of the drawer and hand that here also.' Then he asked her and said, 'Bettie, where is your trunk at?' She said, 'In my room, behind the door.' He said, 'Now Bettie, I want you to do for once in your life just as I tell you about these things.' Then he took the package of papers with the red string round, untied it, and he said: 'Bettie, I want to show these to you, and show you the importance of taking care of them.' He untied the envelope and took out his bank book, and he says: 'Bettie, here is my bank book, which shows you exactly how much I have in bank. I give you this book, and whatever it calls for you will find in the bank, and you can have the money.' Then he laid the bank book on the table and took the notes out of the large envelope, and he says, 'Bettie, here's some notes which will be money for you also.' Then he picked up that white envelope and said, 'There are two notes in here which will be money for you also; I give these also.' Then he laid his hands on them and said, 'Bettie, these are yours, and you will have to take care of them.' Then he picked up a red pocketbook, and he said, 'Bettie, here's my pocketbook; you will find a little change in it; here, take it; keep ^{as} it, and take good care of it,' and laid it with the rest of his papers. Then he picked up his little black purse, and he says, 'Bettie, what I am going to give you now is of great importance and very valuable.' And he undid this little black purse and took out the keys, and said, 'Bettie, these keys belong to the safe at Drewry & Co's, and these which I hold in my hand,' he says, 'belong to the box which I have in the vault in the bank where all my valuables are.' He says: 'These keys open the safe at Drewry & Co's. You won't find anything of any great value in this safe, but what you find in there you can have; it is yours.' He then handed her the

keys of the safe, and says, 'Now, Bettie these keys I now give you are where all my bonds, deeds, and valuable papers are.' He said: 'Bettie, these keys I want you to swing on to as you would your life. Don't let anybody get them away from you on any pretense. In that box, Bettie, in the vault, you will find everything valuable I possess in this world. Whatever you find, Bettie, you can have; it is yours.' Then he handed her those keys and handed her the purse, and told her to be very careful to wrap those keys up in tissue paper, as she found them. Then he gave her his penknives, and said that he set great store by them, and told her not to give them away to anybody, and to be careful not to let anybody steal them from her. Then he turned and tied these papers all together. He took the two purses and slipped them together between the red string and handed them to Bettie; and I was sitting by the table, as I first told you, and he said to her, 'Bettie, I have given you everything I possessed in the world.' Then he said to me, 'Fannie, you see me give Bettie these things?' I said, 'Yes, sir.' Then he said to her, 'Bettie, you will have these things to take care of.' He said, 'Bettie, I am a sick man, and I don't know what may happen to me, and I have been taking care of these things all my life; and, Bettie, you know how careful I am about my papers ⁵⁰ and keys; now you will have to do the same.' He said, 'Now, Bettie, I want you to take this package in your room and put it in your own trunk; raise your underclothes up and place them between your clothes. Lock the trunk and bring me the key here. Bettie, I want to see if your trunk key is a good one.' He took the two keys to the trunk and looked at them, and said, 'Yes, Bettie, they will do'; and he asked her had she strapped the trunk? She told him 'No, she locked it'; and he said to her, 'Bettie, are you crazy?' She said, 'No; that she thought locking the trunk was sufficient'; and he told her it was not sufficient, and to go back and strap it up; that he had given her all that he had in the world, and that if she didn't take care of it she would wind up in the poorhouse. Then he turned to me and asked me again, and said: 'Now, Fannie, you have seen me give Bettie everything I possess in the world.' Then he turned to me and told me I could go, that he was through with me. And Bettie said to me, 'Fannie, go downstairs to the storeroom and get a bottle of that liquid bread, and take the cork out, and bring me a glassful up here for father.' I got the liquid bread, carried

it upstairs, and handed it to Bettie; she handed it to her father; he took a sip of it, and turned to me and said again to me, 'Fannie, you see me give Bettie everything I possess in this world, didn't you?' I said, 'Yes, sir; I did'; and he turned to me and said, 'Fannie, remember that, now,' and I said, 'Yes, sir.' And he told her to take special care of the trunk keys, and, whatever she did, not to leave that trunk open and let anyone steal those things out of there that he had given her; and if she did, she would go to the poorhouse, and to keep her trunk keys on her person day and night."

After the conversation last detailed by the witness, Thomas became much worse late on Friday evening, and Dr. McGuire was again sent for. He arrived at eight o'clock that night, and ⁵¹ left a little after eight. Thomas grew rapidly worse after the doctor left, and the witness, Fannie Coles, testified that Thomas called Bettie and said to her: "Oh! Bettie, I am a mighty sick man—sicker than you have any idea about"; and he says, 'Bettie, where are those things I have given you?' She says, 'In my trunk, safe.' And he says, 'Bettie, where are your trunk keys?' And she said to him, 'I have got them in my bosom here.' And he said, 'That is right, Bettie; keep your keys on your person.' And he says, 'Bettie, make sure of it again; I have given you everything I possess in this world.' He says, 'Fannie, you hear me give them to Bettie again, don't you?' I said, 'Yes, sir.' He says, 'Now, Fannie, remember.' And he said, 'Bettie, I am sicker than ever I was in my life.' And Bettie says, 'I shall send for the doctor.' He says, 'Oh! Bettie, I don't think he can do much good.' Then he turned to her, and he says, 'Oh! Bettie, remember now, I have given you everything'; and he turned over and complained of a severe pain in his side, and in a few minutes he was dead."

It is vehemently charged that the testimony of Fannie Coles as to the *factum* of the gift is false; that it is the result of a conspiracy with Bettie Lewis to defraud the legal distributees of William A. Thomas; that no such gift as she testifies to was ever made. The charge is easily asserted; but law, logic, and a decent respect for human nature all require clear and indubitable proof to induce judicial credence to such an atrocity.

Why should this witness not be believed? Why should a court of justice, in the teeth of her clear, consistent, convincing, and uncontradicted testimony, gratuitously brand her as

a perjured conspirator with Bettie Thomas Lewis, without a particle of evidence of either an uncontradicted or credible witness or a circumstance, simply because William A. Thomas, a dying father, with many years' infallible knowledge of her intelligence ⁵³ and integrity, had called upon her, with his expiring breath, to witness and attest the consummation of the lifelong solicitude of his heart, and his constantly declared purpose to provide amply, at his death, for his cherished child; and, in a legal method, with parental piety, shed his parting benefice and blessing on "a duteous daughter's head"? Her statements in evidence are consistent throughout. They are natural, reasonable, and most probable in themselves, while they are corroborated by the evidence of Dr. McGuire, Stephen B. Hughes, the dying declaration of William A. Thomas himself, and by all the concomitant circumstances of the *res gestæ*. She is wholly unimpeached in any of the ways known to the law; and her character for truth is as fair as that of any other witness in the cause. She is the daughter of a wealthy farmer in Albemarle county, and her mother was a colored woman of mixed blood. She resided with her father in his house, where he employed white persons to teach her, till she was sent, at the age of thirteen years, to the Normal High School in Richmond for several years, when she became a teacher in the public schools of Virginia for five years or more, until, her health failing, she became the chosen companion of Bettie Lewis in her father's house for many years previous and up to his death. She was thirty years old when she testified, and had lived in Virginia all her life; and she was subjected to a protracted and pertinacious cross-examination, which reviewed, with microscopic and relentless scrutiny, her whole life, and which disclosed no single circumstance affecting her moral character, or discrediting her triple armor of truth. No material statement of fact made by her in her testimony is contradicted by any other witness. It is strenuously asserted that she is contradicted by Dr. McGuire; but this is neither just nor true in fact. She says that when she went to Dr. McGuire's office on Friday morning to let him know (as he had instructed the ⁵³ night before should be done) the condition of Mr. Thomas, the doctor inquired of her whether Mr. Thomas had made any will; that she told him he had not; that Mr. Thomas had given Bettie everything the night before; and that Dr.

McGuire replied, "It was not worth a cent." Dr. McGuire does not remember Fanny's then telling him about Thomas having given his property to Bettie the night before; but, he says, "the conversation between Fannie and myself took place while a good many patients were waiting to see me; she may have stated it, though I am entirely unable to recall it; my memory is not very perfect about such things." The statement of Fannie Coles is positive as to what was said, while Dr. McGuire merely says he does not recall it, though he admits that, for the very sufficient reasons he gives, her statement may be true. But it is made obviously and undoubtedly true by what Dr. McGuire then immediately did and said. Soon after Fannie Coles left his office, he went to see Mr. Thomas, and he says, "Bettie told me, after I got in the house, that her father had given her the keys, his bank book, and papers, as far as I can recollect. I think she told me she had put them in the top bureau drawer. She told me he had given them to her; they were to be hers. I told her they were not worth a cent; that unless he made a will the law would give her nothing." Dr. McGuire had never conceived of a gift "*mortis causa*"; and therefore, in his oft-expressed solicitude for Mr. Thomas to provide for Bettie by will, he told Bettie, as he had told Fannie Coles in his office but an hour or two before, that the gift to Bettie was "not worth a cent; and that unless her father made a will, the law would give her nothing." Fannie Coles testified before Dr. McGuire did, and she is corroborated by both the language and substance of Dr. McGuire's statement. And even if this were not so, it would be Dr. McGuire's mere failure of recollection, which happens daily in judicial investigations, without ⁵⁴ giving rise to a suspicion of untruthfulness in the witness. Fannie Coles' testimony, in minute detail of the making of this dying gift of his property by William A. Thomas to his daughter, Bettie, is corroborated by Dr. McGuire's statement of what passed between him and Mr. Thomas in the chamber of death, within an hour of his last breath. Dr. McGuire had, in his mid-day visit to Mr. Thomas on Friday, told him of his extreme illness, and for the last time of often-repeated admonitions to him of the urgency and duty of his making his will to provide against leaving his daughter penniless and to the tender mercies of his uncared-for collateral kindred; and he asked Mr. Thomas' consent to his sending to him a lawyer to write his will. Accordingly he

had sent Mr. M. M. Gilliam out in the early afternoon of that day. Mr. Gilliam stayed only a few minutes—eight, or ten at most—and left the premises. Mr. Thomas became rapidly and alarmingly worse, and Dr. McGuire was summoned, and arrived upon the scene at about eight o'clock that night, and left a few minutes thereafter, leaving directions as to what was to be done for Mr. Thomas that night. He states: "After that was finished I said to him, 'Has Mr. Gilliam been here?' 'Yes,' he answered, 'that's all right, doctor,' with a wave of his hand, as if the matter was settled, and looked to me as if he expected me to approve of what he had said. I said to him, 'I am glad you have done it; you have only done justice.' He then said, 'You will be very well satisfied (or perfectly satisfied) with what I have done.'"

What had this dying, devoted father "done" to repair his failure to convey the valuable city lots to Dr. McGuire as trustee for his daughter, and to build costly houses thereon, and to provide for her by will, when, with his expiring breath, he calmly and coolly assures Dr. McGuire's iterated and over and over again reiterated anxiety about provision for his daughter Bettie—"That's all right, Doctor; you will be very well satisfied (or perfectly satisfied) with what I have done." He meant—and could only mean—that he "had done" that ample provision for his daughter that he always assured Dr. McGuire he intended to make—not by will, but by giving and delivering to her, on his deathbed, the bulk of his personal property, which was just as effectual and just as legal as a will.

It is argued that Mr. Thomas did not make the gift *mortis causa*, of his property, to his child Bettie, as distinctly and incontrovertibly proved, because of his oft and emphatic statement of intention to provide for her by will; and, time and time again, it is argued, that, in the eight or ten minutes of Mr. Gilliam's presence with him alone in the death-chamber, only a brief time on Friday afternoon before he expired, he made an appointment with Mr. Gilliam to go to Mr. Gilliam's office the next day to have his will written. Aside from the utter improbability—not to say impossibility—of an enfeebled and dying old man, in the country, beyond the limits of the city of Richmond, making an engagement, at 4 o'clock P. M., to arise from what proved to be his deathbed early that night, and to come into the city and to a lawyer's office the next day, there is no evidence in the record of any such purpose

or possibility. What passed between Mr. Thomas and Mr. Gilliam, in those eight or ten minutes, we can never judicially know. Thomas is dead; and Mr. Gilliam, one of the counsel for appellants, has declined to testify in this case. The appellants, by their cross-examination, elicited from Dr. McGuire: "I think Mr. Gilliam told me, a short time afterwards, that Mr. Thomas, in his interview with him, said there were some papers that he wanted to get hold of, then out of reach; and that he had postponed the making of his will until the next day. I think he had an appointment with Mr. Gilliam for the next day. I think Mr. Gilliam said this." Both this question and answer were objected to by the plaintiffs, as ⁵⁶ illegal. Mr. Gilliam's attitude of the Sphinx cannot be operated as hearsay evidence in this case, by any *Cædipus*, however respectable; and, howsoever important or interesting Mr. Gilliam's pregnancy of what occurred in that brief interview with the dying man may be, he cannot be delivered by the process of obstetrics, unknown to the science of the law. If, too, the field of conjecture be open, it is the most reasonable supposition that, if Mr. Thomas did, in fact, want his will written the next day, it was only for the purpose of devising to his daughter, in addition to the personal property he had given her, his valuable real estate; which he knew could not be given except by deed or will.

While no witness testifies that Thomas ever said that he intended to give his whole estate to his daughter, yet he frequently declared his purpose to provide for her liberally. And no one ever heard him say that he intended to give anything to anyone else. And the plain and positive proof is, that he did not intend (but emphatically asserted to the contrary) that his collateral kindred should have any part of "what he had at his death." To whom, then, but his daughter, must he have intended his property to go at his death? If he had left her his whole estate, by a will, instead of the larger part only by *donatio mortis causa*, all just-minded persons would have said, as Dr. McGuire's last utterance to him, "you have only done justice!"

Mr. Stephen B. Hughes testifies: "I was at Thomas' house the night of his death. I asked Bettie Lewis where Mr. Thomas' keys were. She said that she had them; that her father had given them to her, and told her to lock them up; that they were hers, and not to give them to anybody. I heard Fannie Coles say that she was present when Mr. Thomas

gave Bettie Lewis the keys, and told her to lock them up, and not to give them to anybody; that they were hers (Bettie Lewis, I mean); and took me into the back chamber ⁵⁷ and showed me the trunk that they were locked up in." And this witness says that this fact, together with what Mr. Thomas had previously told him were his intentions towards Bettie, were his reasons for offering to deliver to Bettie the duplicate set of keys which he held. When Bettie Lewis told Dr. McGuire (as she unquestionably did tell him), on Friday, before he had seen Mr. Thomas, and just as he was about to enter Mr. Thomas' room, that her father had made the gift to her, she might reasonably have known that he would mention it to her father, as he was urging him to make a will; and it is impossible to believe, without contradicting all human experience, that she would ever have made this statement to Dr. McGuire at the time and under the circumstances if it had been false and fabricated, as alleged. These declarations of Bettie Lewis and Fannie Coles, as well as the declaration of Bettie Lewis to Mr. Hughes, are competent evidence on both of two grounds—as part of the *res gestæ*, and as the declaration of a party in possession, and to rebut and repel the inference sought to be drawn from the testimony of the witness for the appellants, Watkins, as to the silence of Bettie Lewis, in respect to her claim, in her interview with him on Monday night next after Thomas died. It is vehemently insisted that her silence on that occasion as to any gift made to her by her father was equivalent to an admission that none had been made; that she had no claim, and pretended to none. Shall it be, in a court of justice, that she may not repel this inference by the testimony of Dr. McGuire and Stephen B. Hughes that she had, to them, on prior occasions, asserted her claim? If the silence of Bettie Lewis as to the gift, in her conversation with Watkins on Monday night, is a circumstance prejudicial to her claim, what is the significance of the assertion of her claim on Friday night before—the night that Thomas died—to Mr. Hughes, and to Dr. McGuire on Friday morning, while Mr. Thomas was yet living? What she said ⁵⁸ to Mr. Hughes was only in reply to his direct inquiry about the keys; and Watkins did not, in that conversation on Monday night, ask her anything about the keys; and she did not make any statement to Watkins then about the gift, because (it may have been) of intuitive distrust, or because Dr. McGuire had told her, as he had told Fannie Coles, that

the gift "was not worth a cent." Dr. McGuire, as before stated, had never heard of such a thing in law as a gift *mortis causa*; and she, relying on Dr. McGuire's opinion, and not then having consulted any lawyer about the matter, there was no occasion for her to mention the gift in that conversation with Watkins.

Mr. Thomas was buried on Sunday. On the night of Monday (the next day) Watkins called to see Bettie, and he says that she did not then say to him that her father had given her his money, his bank book, or other securities, or the key to his box in the bank or his safe at Drewry & Co's, and that she did then say, as there was no will, she supposed that all she would have was the property held by me as trustee, and that she wished I would see Mr. Gilliam in her behalf. This statement, if true, has already been explained by what Dr. McGuire and others had so impressively told Bettie Lewis would be her condition if her father died without a will. But is it not manifestly impossible for Bettie Lewis to have affirmed positively, as a fact in her knowledge, on Monday night, that Mr. Thomas had left "no will, and she knew it," when, then, there had been no opening or examination of Mr. Thomas' papers or places of safe deposit. Dr. McGuire says: "Bettie Lewis certainly did not know that before the old man's death, for she and Fannie both told me that they did n't know whether the old man had made a will or not when Mr. Gilliam was there." Bettie Lewis has been peremptorily denied the privilege of testifying in this case, notwithstanding the great concern she has at stake; and simple justice demands that the statements of this witness (Watkins) for the appellants ⁵⁰ should be tested by all the touchstones of truth—probability and consistency—which are the fixed standards of evidence.

Out of the mouth of this witness himself the record shows that he involves himself in flat and flagrant self-contradictions; but, first, his attitude and *animus* in the case are manifested by his interview with Bettie Lewis on Thursday night next following. He says: "I told Bettie Lewis that I had been to see Mr. Gilliam for her, and stated the case to him the best I could, and he said it was impossible to make a case of it, and that he was sorry he could not do something for her. She said it made no difference; that she had employed other counsel—viz., Judge Waddill, Judge Christian, and Edgar Allan. She then said she was very much obliged to me for

seeing Mr. Gilliam for her. I said to her I had nothing but her interest at stake, and that I would be glad to know exactly what Mr. Thomas said to her in his last moments. Fannie Coles, who was sitting near by, said: 'Bettie, Judge Christian told you not to talk to anyone on the subject.' I said: 'If such are your instructions, I certainly don't want to hear anything about it.'" By this, Mr. Watkins' own version, it appears that, after Bettie Lewis had told him she had confided her case to the counsel of her choice, he, adroitly and artfully prefacing his question with the professing of his disinterested solicitude for her interest at stake, asked her to tell him "exactly what Mr. Thomas said to her in his last moments." The object of this attempt is obvious enough; but, by the significance of Mr. Watkins' attitude in this case, as disclosed by the record, it is made perspicuously plain. Fannie Coles' account of this interview, in response to the 287th cross-question, shows that Mr. Watkins used importunity and expostulation in his endeavor to induce Bettie Lewis to let him "know exactly what Mr. Thomas said to her in his last moments"; and that it was not until he had been repeatedly denied and thwarted in his attempt that he said (if, indeed, he said it at all), "If such are your instructions, I certainly don't want to hear anything about it." Fannie Coles says: "Mr. Watkins came out there one night, and asked Bettie about her father giving her the keys. Her reply was to him: 'Mr. Watkins I do not care to talk on that subject at all.' Mr. Watkins turned to me and said: 'Fannie, don't you think Bettie ought to tell me all about the keys, for I am just the same to her as her father?' I said: 'Mr. Watkins, I don't know anything about that. She has her lawyers, and she ought to do as they told her to do.' And Mr. Watkins said: 'Now, Fannie, you know there is nothing in the world that I would not do for Bettie.' I said: 'You and Bettie can suit yourselves about the matter. I have no more to say.' Mr. Watkins again asked her. She said: 'Mr. Watkins, I do not care to talk on that subject to-night.' And I remember now as you mention the subject, that Mr. Watkins said to her: 'Bettie, I only came out here to-night to find out all about those keys.'" The record shows that this witness, who professed that he had nothing but Bettie Lewis' interest in view, and who had promised Mr. Thomas (as he says), on the sixteenth day of February, 1878, "I will do the very best for her as long as I live," and who under-

took to see Mr. Gilliam for the purpose of stating "her case" to him, and of seeing whether "he could make a case of it," was, a day or two after, if not at the very time, he was inviting Bettie Lewis' confidence on the ground of his fatherly interest in and for her, actually conferring with Mr. Thomas' next of kin, and entertaining a proposition to be appointed one of the curators, which only failed because Mr. Pace (Page) objected to going his security; and that, although he averred his intimate knowledge of Mr. Thomas' affairs, yet he refused to tell what he knew when requested so to do by Bettie Lewis' counsel. And this witness (except a Mr. Gravely, who knows nothing) is the only witness who has ⁶¹ been found to defeat the fully attested claim of Bettie Lewis to her father's bounty. He fixes Monday night next after Mr. Thomas' death as the date he was out at Mr. Thomas' house, by the fact that he went there to see an insurance policy, and he was certain he saw the policy there that night; and he swears that he is certain that he saw Clay Thomas there that same evening; yet he swears that it was on Thursday night that he went to see, and did see and examine, the policy; and that it was on Thursday night that he first saw Clay Thomas there. This is the unenviable attitude of this the only witness to support the contest of Mr. Thomas' collateral kindred, and to defeat his dying disposition of the bulk of his personal property.

The testimony and the circumstances relied on by the appellants to show that no such gift was made by Mr. Thomas as sworn to by Fannie Coles and attested by corroborating facts, do not, we think, furnish a sufficient basis for even reasonable conjecture, much less to assure the guarded discretion of a court of justice. The circumstance that there is but one direct witness to the gift competent to testify (the appellants declining to allow the donee as a witness when offered) does not affect the validity of the gift. One witness, if credible, is sufficient; the law does not require more than one; and, especially, as in this case, when that one is not only unimpeached, but corroborated. Nor does the magnitude of the gift affect its validity; it may extend to the whole of the donor's personal estate; the law fixes no limit. In the case of *Duffield v. Elwees*, 1 Bligh, N. S., 497, the gift *causa mortis* was of the value of one hundred and sixty-five thousand dollars. In *Hatch v. Atkinson*, 56 Me. 327, 96 Am. Dec. 464, the court says: "The common law does not require the gift to be exe-

cuted in the presence of any stated number of witnesses; nor does it limit the amount of the property that may thus be disposed of": 1 White and Tudor's Lead. Cas. Eq., pt. 2, 1251; 2 Schouler on Personal Property, 132, 136.

⁶² The *factum* of the gift, in this case, being clearly and conclusively proved, as, we think, it indisputably has been, it only remains to state the law and apply it to the facts proved. They show all the essential attributes or constituent elements of a *donatio mortis causa*, as defined by the law and established by the course of adjudication. The gift was made *in periculo mortis*, under the apprehension of death as imminent; and it was of personal property, such as, under the law, may be the subject of a gift *mortis causa*. Possession or delivery was made at the time of the gift; and the donor died of that illness in a few hours after the making of the gift; thus the gift, inchoate, conditional, and defeasible when made, became absolute at the donor's death. Delivery is essential; it may be either actual, by manual tradition of the subject of the gift, or constructive, by delivery of the means of obtaining possession. Constructive delivery is always sufficient when actual; manual delivery is either impracticable or inconvenient. The contents of a warehouse, trunk, box, or other depository may be sufficiently delivered by delivery of the key of the receptacle: *Jones v. Selby*, Prec. Ch. 300; *Ward v. Turner*, 2 Ves. Sr. 431; 1 Lead. Cas. Eq. 1205; *Jones v. Brown*, 34 N. H. 445; *Cooper v. Burr*, 45 Barb. 10; *Penfield v. Thayer*, 2 E. D. Smith, 305; *Westerlo v. Dewitt*, 36 N. Y. 341; 93 Am. Dec. 517; *Ellis v. Secor*, 31 Mich. 185; 18 Am. Rep. 178; *Hillebrant v. Brewer*, 6 Tex. 45; 55 Am. Dec. 757; *Elam v. Keen*, 4 Leigh, 333; 26 Am. Dec. 322; *Stephenson v. King*, 81 Ky. 425; 50 Am. Rep. 172; *Lee v. Boak*, 11 Gratt. 182.

Many cases were cited by the appellants. In some of them it did not appear that there was any intention to give, while in others the delivery of possession was not complete—the donor intentionally retaining control or dominion. In the cases of *Miller v. Jeffress*, 4 Gratt. 472; *Lewis v. Mason*, 84 Va. 731; *Yancey v. Field*, 85 Va. 756; *Rowe v. Marchant*, 86 Va. 177, there ⁶³ was no delivery whatever, either actual or constructive. The delivery of the keys to Bettie Lewis, with words of gift by her father upon his deathbed, invested her with the same means of obtaining possession that Thomas had; and made her the owner, with title defeasible only by recovery or revocation of the donor, or by a deficiency of assets

to pay creditors; and the mere existence in Stephen B. Hughes' hands of a duplicate set of keys, for precaution against loss or accident, which he had no right or authority to use, did not impair the validity of the gift which he did make to his daughter, in his last moments, in the most unqualified manner; and being thus invested with lawful ownership, the law, in case of refusal by the officers of the bank, would open the doors to her.

It is contended that the gift was testamentary, because of the words in the affidavits of Bettie Lewis and Fannie Coles, "were hers in case of his death"—"to be hers in case of his death." The affidavits were prepared by counsel, and certified by the notary, as a predication for the appointment of receivers; and they were not intended, and could not be regarded, as evidence; and they do not purport to give the language of the affiants, nor to state the language and actions, in detail, of Mr. Thomas in making the gift. But, even if Mr. Thomas had used the very words, "to be hers in case of his death," it would have been but expressing in terms the very definition, substance, and form of a gift *mortis causa*, as given by all the law-writers and adjudged cases; that it is conditional, defeasible—not to be absolute and irrevocable unless and until the death of the donor from the impending peril under the apprehension of which the gift was made: Bouvier's Law Dictionary, "*Donatio mortis causa*"; 1 Abbott's Law Dictionary, 402; 2 Jacobs' Law Dictionary, 307; 3 Pomeroy's Equity Jurisprudence, sec. 1146; 2 Schouler on Personal Property, 2d ed., c. 5, sec. 135; *Parish v. Stone*, 14 Pick. 198; 25 Am. Dec. 378; ⁶⁴ *Grover v. Grover*, 24 Pick. 261; 35 Am. Dec. 319; *Gano v. Fisk*, 43 Ohio St. 462; 54 Am. Rep. 819; *Taylor v. Henry*, 48 Md. 550; 30 Am. Rep. 486. The cases in which gifts made in similar and identical language, by dying donors, have been held to be valid donations *mortis causa* are numerous—the principle being, that the expression, "in case of my death it is yours," or like words, do not, of themselves, make a testamentary disposition, but merely express the condition which the law annexes to every donation *mortis causa*: *Snellgrove v. Baily*, 3 Atk. 214; English notes to *Ward v. Turner*, 1 Lead. Cas. Eq. 1222; *Ashbrook v. Ryon*, 2 Bush, 228; 92 Am. Dec. 481; *Grymes v. Hone*, 49 N. Y. 17; 10 Am. Rep. 313.

In the case of *Sterling v. Wilkinson*, 83 Va. 791, the gift was made more than three years before the donor died, and was

not made in view of death impending; and the donor actually did retain and exercise control over the subject of the gift by disposing of so many of the bonds as were necessary to indemnify his indorsers. In the case of *Basket v. Hassell*, 107 U. S. 602, the decision turned alone on the construction and legal effect of the indorsement upon the certificate by the donor: "Pay to Martin Basket . . . —no one else—then not until my death." This was held to be a testamentary disposition; but in the opinion of the court Mr. Justice Matthews says: "The certificate was payable on demand; and it is unquestionable that a delivery of it to the donee, with an indorsement in blank, or a special indorsement to the donee, or without indorsement, would have transferred the whole title and interest of the donor in the fund represented by it, and might have been valid as a *donatio mortis causa*."

It is contended that the gift by Thomas, in this case, was invalid, because it comprised the bulk of his estate. The *jus disponendi* is the essential value and element of property; and the exercise of that right is commended in the beatitude: "It ⁶⁵ is more blessed to give than to receive." By the law of Virginia a person may make a dying disposition of all of his personal property, *donatio mortis causa*; and there is no limit as to the extent of the gift—whether of the whole or of the part—*inter vivos* or *donatio mortis causa*. Such limitation can only be by express legislation; and the courts are invested with no such function. The Roman or civil law of "*donationes mortis causa*" did recognize the limitation or restriction; but the common law does not limit the amount—absolute or comparative—of the personal estate which may thus be disposed of: *Michener v. Dale*, 23 Pa. St. 59; *Seabright v. Seabright*, 28 W. Va. 481; *Hatch v. Atkinson*, 56 Me. 327; 96 Am. Dec. 469; 1 White and Tudor's Lead. Cas. Eq., pt. 2, 1251; 2 Schouler on Personal Property, 132–136.

It is contended that the gift in this case comes within the operation of the section 2414 of the code of Virginia; and, as the donor and donee resided together at the time of the gift, possession by the donee at the common place of residence was not sufficient; and, for that reason, the gift must fail. The section is: "No gift of any goods or chattels shall be valid, unless by deed or will, or unless actual possession shall have come to and remained with the donee or some person claiming under him. If the donor and donee reside together at the time of the gift, possession at the place of their residence shall

not be a sufficient possession within the meaning of this section." In the construction of statutes the general rule is, that the words used in the statute are to be construed according to their natural and ordinary popular and accepted use and meaning, unless it plainly appears that it was intended by the legislature to give to them a different, special, and extraordinary meaning. All the law-writers use the simple term "gift," when used without qualification, to express the "ordinary gift," or "simple gift," which transfers an absolute and irrevocable title to the donee, as contradistinguished from the extraordinary and technical gift, "*mortis causa*," which is made under the apprehension of impending death, and transfers only a conditional, defeasible, and revocable interest. The peculiar gift, "*mortis causa*," is always designated by its special, technical name; and it is never understood or intended to be embraced or expressed by the term "gift" merely. A gift "*mortis causa*" is a very different thing from a "gift" in many essential particulars: 2 Kent's Commentaries, lecture 38; 2 Schouler on Personal Property, 2d ed., sec. 64.

The policy of the section (2414) originated in 1757, and again in 1758, and in 1787, in the revised code of 1819, in the code of 1849, and in the code of 1887; and in none of these enactments is the special, peculiar, and distinctive technical descriptive phrase, "*gifts mortis causa*," to be found. The mischief intended to be guarded against in the policy of the statute was as to gifts *inter vivos*; and, until 1849, it was applicable only to gifts of slaves. Then it was made to embrace all "goods and chattels"; but it would violate both reason and analogy to hold that, in its new, any more than in its ancient form, it would embrace gifts *mortis causa*. It is an established rule of construction that the existing law is not intended to be changed unless such intention plainly appear; and the inference is irresistible that the legislature did not intend to abrogate the common law of "*donatio mortis causa*," without having, expressly and by proper descriptive legal language, said so: *Parramore v. Taylor*, 11 Gratt. 242, 243; *Owners etc. v. Bragdon*, 21 Gratt. 695; *Durham v. Dunkly*, 6 Rand. 139.

The disposition of personal property by "*donatio mortis causa*" has been a principle and practice of the common law, both in England and in the states of this union, for centuries past; and although, since the day of Lord Hardwicke, there

have been extrajudicial utterances in deprecation of it, it is, to-day, a fixed principle of enlightened jurisprudence in all ⁶⁷ civilized countries. It is the imperative function of the courts to interpret and operate the law as it is—not as they may think it ought to be.

In the able and elaborate opinion of Judge Leake, filed with the record in this case, he decided (saying, “but certainly not without doubts”—“the question to my mind is a very doubtful one”) that the gift by Mr. Thomas of his bank book, showing the amount of his deposits in the Planters' National Bank, was ineffectual in law as a *donatio mortis causa* of the money to his credit in the said bank; and he decreed accordingly.

In this, I am of opinion, the decree under review is erroneous; and that it should be, under the rule, in this particular, corrected in favor of the appellees, and in all other respects affirmed; but the majority of the court think the decree is wholly right, and that it must be affirmed as it is.

Every species of personal property, in its largest sense, capable of delivery, actual or constructive, may be the subject of a valid gift *mortis causa*, including money, bank notes, stocks, bonds, notes, due bills, certificates of deposit, and any other written evidence of debt: *Lee v. Boak*, 11 Gratt. 182, and cases there cited; *Elam v. Keen*, 4 Leigh, 333; 26 Am. Dec. 322; 1 Lead. Cas. Eq., 1205; *Duffield v. Elwees*, 1 Bligh, N. S., 497; *Grover v. Grover*, 24 Pick. 265; 35 Am. Dec. 319. In the case of *Coleman v. Parker*, 114 Mass. 33, it is said: “This term ‘delivery’ is not to be taken in such a narrow sense as to import that the chattel or property is to go literally into the hands of the recipient and to be carried away. There are many articles which might be made the subjects of a donation *mortis causa*, in which a manual delivery of that kind might be inconvenient or impracticable. We have no doubt that a trunk, with its contents, might be effectually given and delivered in such a case by a delivery of the key.” In the case of *Cooper v. Burr*, 45 Barb. ^{es} 9, it is said: “The situation, relation, and circumstances of the parties and of the subject of the gift may be taken into consideration in determining the intent to give, and the fact as to delivery. A total exclusion of the power or means of resuming possession by the donor is not necessary.” In *Elam v. Keen*, 4 Leigh, 335, 26 Am. Dec. 322, Judge Carr said: “There are many things of which actual, manual tradition cannot be made,

either from their nature or their situation at the time. It is not the intention of the law to take from the owner the power of giving these. It merely requires that he shall do what, under the circumstances, will in reason be considered equivalent to an actual delivery." In *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 469, the court said that delivery must be as complete "as the nature of the property would admit of": See *Wing v. Merchant*, 57 Me. 388; *Dole v. Lincoln*, 31 Me. 422; *Hillebrant v. Brewer*, 6 Tex. 45; *Noble v. Smith*, 2 Har. & J. 52; *Jones v. Brown*, 84 N. H. 445; *Marsh v. Fuller*, 18 N. H. 860.

In *Stephenson v. King*, 81 Ky. 425, 50 Am. Rep. 172, 177, the court, referring to the case of *Ashbrook v. Ryon*, as to the bank book, says: "What evidence the pass book contains of the deposit in that case does not appear. If an ordinary pass book (and it must be so inferred), it was an acknowledgment by the bank that the donor had to his credit in the bank that much money; and, when actually delivered, we cannot see why it did not pass the right."

Suppose Mr. Thomas, instead of having certificates of deposits, made and entered by the bank in his bank book, had taken a separate receipt or certificate of deposit for each deposit at the time it was made, would not the delivery, with words of gift, of each one of such receipts or certificates of deposit, have been as effectual in law to pass the title to his money in bank, as the delivery of the letter in *Stephenson v. King*, 81 Ky. 425, 50 Am. Rep. 172, 177, or the attorney's receipt for claims in his hands for collection, in *Elam v. Keen*, 4 Leigh, 335; 26 Am. Dec. 322.

•• Mr. Thomas' bank book had just been written up or balanced by the bank, and it showed on its face the balance due to him by the bank. It was the bank's acknowledgment of indebtedness to Thomas, and the only voucher or evidence which he had, upon which the law implies a promise to pay; and it was transferable by delivery without writing, like any other chose in action. It passed the equitable title, and that is sufficient. The "beneficial owner" of any chose in action may sue upon it in his own name: Code 1887, sec. 2860. There is a difference between a savings bank pass book and an ordinary bank book; in that, by a special method and agreement, on the mere presentation of the savings bank pass book, the bank will pay; but this is the mere special mode of dealing agreed on by the parties in that case, and

though the bank would have the right to require evidence to satisfy it that Mr. Thomas had duly delivered, with words of gift sufficient in law to transfer his title to his money in the bank to his donee, Bettie Lewis, his daughter, yet that would not, any more than in the case of the keys, affect her title and right to demand the money, which the law would enforce.

This case was first argued before Chancellor Fitzhugh, and submitted for his decision; but he died in a few days, leaving nothing to show what conclusion he would have reached upon the facts. He had (as it appears by what is stated in the petition for appeal) noted down a few platitudes or propositions of law, which (no more than if he had copied the decalogue) do not afford the slightest clue as to what he would have decreed upon the facts, under the law.

We have given to this case elaborate consideration and the closest scrutiny; and, upon the law and the facts, our judgment is to affirm the decree of the chancery court of the city of Richmond.

¶ LEWIS, P., concurring. I concur in the opinion that the decree of the chancery court ought to be affirmed, and add a few words to what has been said by the court, only because of the reliance for the appellant upon the case of *Yancey v. Field*, 85 Va. 756. It has been asserted that that was a case of a gift *mortis causa*, which this court refused to sustain, because of its want of compliance with the statute now carried into section 2414 of the code. In other words, that this court in that case construed that statute as applying to gifts *mortis causa*.

There is no warrant whatever for such a proposition.

In the first place, it was not claimed that the alleged gift in that case was a gift of that description. On the contrary, it was distinctly claimed as a gift *inter vivos*. The petition filed in the lower court, after stating that Judge Field died indebted to Yancey, further averred as follows:

"Your petitioners further represent that the said James P. Yancey, a short time before his death, gave to your petitioner, Edmonia, the indebtedness to him by the said R. H. Field, she, the said Edmonia, being a niece of the said James P. Yancey; that the bonds evidencing said indebtedness could not be delivered, as they had been filed with the commissioner in the said suit of *Yancey v. Field*, 85 Va. 756. And your petitioners insist that they are, by virtue of the said gift, en-

titled to the said indebtedness, and to have the said debts indorsed for their benefit."

The same counsel who prepared this petition argued the case for the appellees in this court, and both in his oral and printed arguments he insisted that the alleged gift was valid as a completed gift *inter vivos*. In his brief, filed with the record, he said: "The testimony proves not only the gift, but that it was a completed gift *inter vivos*." And again: "In the case at bar there is no claim by virtue of a nuncupative will or other testamentary act. From the very first the gift was claimed as an act *inter vivos*."

It will thus be seen that the case was presented to the lower court and to this court as a gift *inter vivos*, and as such it was dealt with. As the appellees themselves admitted that there had been no delivery of the subject matter, that, as the court said, was decisive of the case, whether viewed as an intended gift *inter vivos* or *mortis causa*; and this was all that was necessary to the decision of the case. Reference, however, was made in the opinion to some of the general principles of the common law relating to gifts, and to the difference between the two classes of gifts, attention being especially called to the necessity of a delivery in all cases. And as illustrative merely, or rather to call attention to the fact that the common-law requirement of delivery in case of a verbal gift had been incorporated in our statute law, the statute was referred to.

The court, however, did not say the statute was intended to apply to gifts *mortis causa*, for no such question, as we have seen, was before the court, and, therefore, the expression of any opinion on that subject would have been purely *obiter*. This, indeed, is so obvious from the opinion itself that I ought, perhaps, to beg pardon for adding anything to what has been said in the opinion of the court in this case.

JUDGE LACY dissented. At the outset of his dissenting opinion he emphasized the fact that the alleged gift was of the whole of an estate amounting to two hundred thousand dollars, and was claimed to have been made by the decedent to a colored woman living in his house, and claiming to be his illegitimate child. He said that if everything was done as claimed, the gift was made by the donor to the donee at their place of residence, and was therefore, in his judgment, within the provision of the statute of Virginia providing that no gift of any goods or chattels shall be valid unless by deed or will, or unless actual possession shall have come to or remained with the donee, or some person claiming under him, and that if the donor and the donee reside together at the time of the gift, possession at the

place of their residence shall not be a sufficient possession within the meaning of the statute. He was further of the opinion that the word "gift," as used in this statute, was not limited, but was used in its full signification, and comprehended gifts of every possible nature. He referred to the case of *Dickeschied v. Bank*, 28 W. Va. 340, in which he said that the court of that state had declared that the object of a statute similar to the one here under consideration was to protect the estates of decedents from the rapacity of unscrupulous attendants residing with or constantly surrounding them, and to prevent them from appropriating to their own use the slaves and other personal property of the alleged donor. The judge also referred to the general rule that a delivery is indispensable to the validity of gifts *causa mortis*, and referred to a number of cases supporting this doctrine: *Lee's Ex. v. Boak*, 11 Gratt. 185; *Morrison's Ex. v. Grubb*, 23 Gratt. 342; *Yancey v. Field*, 85 Va. 756; *Ward v. Turner*, 2 Ves. Sr. 431; *Basket v. Hassell*, 107 U. S. 602.

GIFTS CAUSA MORTIS.—WHAT VALID AS: See *Goulding v. Horbury*, 85 Me. 227; 35 Am. St. Rep. 357, and note with the cases collected; also the extended notes to *Appeal of Wcyneburg College*, 56 Am. Rep. 253; *Sheedy v. Roach*, 26 Am. Rep. 684; *Stephenson v. King*, 50 Am. Rep. 178; *Pope v. Burlington Sav. Bank*, 48 Am. Rep. 787; and *Bruns v. Schuett*, 48 Am. Rep. 508.

GIFTS CAUSA MORTIS—SUFFICIENCY OF DELIVERY.—Actual delivery is essential to distinguish a gift *causa mortis* from a legacy: *Drew v. Hagerty*, 81 Me. 231; 10 Am. St. Rep. 255, and note; *Hatch v. Atkinson*, 56 Me. 324; 96 Am. Dec. 464, and note. A gift *causa mortis* requires for validity either that the thing given or the means of reducing it to possession should be delivered to the donee: *Harris v. Clark*, 3 N. Y. 93; 51 Am. Dec. 352, and note; *Yancey v. Field*, 85 Va. 756; *Tomlinson v. Ellison*, 104 Mo. 106. The delivery required to perfect gifts *causa mortis* is that the donor part with all his dominion over the article: *McDowell v. Murdock*, 1 Nott & McC. 287; 9 Am. Dec. 684. See, also, the extended notes to *Pope v. Burlington Sav. Bank*, 48 Am. Rep. 787; and *Stephenson v. King*, 50 Am. Rep. 178.

GIFTS CAUSA MORTIS OF DEPOSITS IN BANK—SUFFICIENCY OF.—The general question as to the sufficiency of gifts of deposits in banks is discussed in the note to *Orook v. First Nat. Bank*, 35 Am. St. Rep. 28, where the cases are collected, and the extended note to *Sheedy v. Roach*, 26 Am. Rep. 684. A gift *causa mortis* of money deposited in a bank may be consummated by a delivery to the donee of the bank book representing the deposits: *Ridden v. Thrall*, 125 N. Y. 572; 21 Am. St. Rep. 758; *Pierce v. Boston etc. Sav. Bank*, 129 Mass. 425; 37 Am. Rep. 371; *Tillinghast v. Wheaton*, 8 R. I. 536; 94 Am. Dec. 126, and note; 5 Am. Rep. 621. But in *Ashbrook v. Ryan*, 2 Bush, 228, 92 Am. Dec. 481, it was held that the delivery of a pass book will not pass money in a bank as a gift *causa mortis*.

BOSHER v. RICHMOND AND HARRISONBURG LAND CO.

(39 VIRGINIA, 455.)

CORPORATIONS.—IF A SUBSCRIPTION FOR SHARES HAS BEEN OBTAINED BY FRAUDULENT REPRESENTATIONS, it may be annulled by the subscribers at any time before other equities have intervened.

CORPORATIONS.—A PROMOTER is one who brings about the incorporation and organization of a corporation. Every person acting by whatever name in the formation and establishment of a company at any period prior to its incorporation occupies a fiduciary relation towards it. He is an agent of the corporation, and subject to the disabilities of its agents.

CORPORATIONS.—A PROMOTER IS GUILTY OF A BREACH OF TRUST if he sells property to the corporation purchased after he begins promoting and without informing the company that the property belongs to him, or if he accepts a bonus or commission from one who sells property to the corporation.

CORPORATIONS.—ONE INDUCED BY FRAUD TO SUBSCRIBE TO STOCK of a corporation may maintain a bill in equity to restrain suits at law upon his undertakings and to set aside the contract of subscription, and also, if he wishes, may recover back payments already made.

CORPORATIONS.—JOINDER IN SUITS TO SET ASIDE SUBSCRIPTIONS TO.—Several persons who by the same fraudulent misrepresentations are induced to subscribe for stock in a corporation may join in an action against the corporation and its promoters who are implicated in such frauds, to set aside their subscriptions and to recover moneys paid thereon.

SUIT in the circuit court of Rockingham county to set aside subscriptions to the stock of the Richmond and Harrisonburg Land Company. Decree for the defendants, and the complainants appealed.

F. H. McGuire, for the appellants.

W. W. and B. T. Crump, for the appellees.

455 LACY, J. The bill in this case was filed in the said court in July, 1891, by the appellants, E. J. Boshier, George W. Mayo, F. C. Christian, and John O'Toole, who sued for the benefit of themselves and all other stockholders of the Richmond and Harrisonburg Land Company having like interest with themselves, being those who subscribed for the stock of the said company and were required to pay for the same at par, and being all the stockholders of the company except the promoters named in the bill, who would come in and contribute to the expense and share the benefits of the suit against the said Richmond and Harrisonburg Land Company, Philip B. Sheild, receiver, and the promoters named as defendants, and unknown partners, who are afterwards named and brought in by an amended bill, seeking to set aside their

stock subscriptions, to rescind and annul their contracts of subscription, and to have repayment of the sums paid by them as subscriptions to their stock, and for general relief, upon the ground of fraud practiced upon them by the defendants in procuring their subscriptions to the stock of the company, and the bill further sets forth that, upon the discovery by them of the fraud which had been practiced upon them, the complainants had refused to pay further sums upon their contracts of subscription, upon the ground of the fraud and deceit employed against them by the defendants, and demanded back the money already paid by them, whereupon the defendants had, among themselves, instituted a suit, without notice to the complainants, seeking to enforce the payment by the complainants of their stock subscriptions not yet paid, and had a receiver appointed by the court to collect from them the said unpaid sums; and it is prayed in the bill that this suit be heard with that, and that the receiver in that suit and the other defendants be enjoined and restrained from collecting these unpaid subscriptions until the further order of the court.

To this bill the defendants demurred, and the demurrer was ⁴⁵⁷ sustained by the court, upon the expressed ground that this was a misjoinder of plaintiffs; and both the original and amended bills were dismissed, the court declining to pass upon any other question in the case. Whereupon the case was brought to this court by appeal.

The circumstances and all the details of the fraud and false and fraudulent misrepresentations are set forth with great minuteness and distinctness in the bill—the false statements as to the locality of the property, and its eligibility, several times multiplying the true amount of the value and cost of the property, and false statements as to the amount of capital put in by the promoters, together with a false statement that there were no preferences in favor of the promoters—and making out a case of fraud and deceit so gross that the counsel for the appellees, in the argument in this court, admitted that, if they were true, the appellees should be arraigned in a criminal court upon them. It is not deemed necessary, however, in considering the single question involved here, “whether the plaintiffs can bring this suit jointly,” to recite the charges of fraud herein. We are to consider the single question decided by the circuit court upon the demurrer for misjoinder of plaintiffs, which is, these charges, distinctly stated, being

true, so far as were pleaded, then whether the plaintiffs can jointly maintain their suit.

The jurisdiction of a court of equity to rescind contracts fraudulently procured is undisputed. The appellants insist that one object to be attained by proceedings in chancery is to prevent a multiplicity of suits, and hence several persons who have a common interest, arising out of the same transaction, although their interest, strictly speaking, is not joint, may unite in one suit, and may even be compelled to do so by the defendant (citing Barton's Chancery Practice, p. 253); that it is a favorite object of equity to prevent a multiplicity of suits (Sand, 13 ed.), and that there is an exception allowed, ⁴⁵⁸ founded on the mere fact of numerousness, when it may amount to a great inconvenience or positive obstruction of justice (Story on Equity Pleading, secs. 96, 98); and insist that in this case the petitioners, and those in whose behalf they sue, are about two hundred in number, are a class well defined and distinct from the promoters, necessarily antagonistic in interest to them and to the company, which they organize and control. Upon a prospectus, and upon circulars, cards, statements, etc., supplementary thereto, in which the grossest material misrepresentations were made, all the petitioners' class were introduced to make contracts—all exactly alike; all based upon said prospectus, circulars, cards, etc.; all made with the same party, the defendant company; and all fraudulent and void. That the company, by its agents, fraudulently, by the issue of a false prospectus and the circulation of false circulars, cards, statements, etc., induced petitioners and all stockholders of their class to subscribe for its stock and pay in their money. And the prayer is that these contracts be rescinded and the money refunded to the defrauded stockholders. That the prospectus is referred to, and made a part of each certificate of stock.

On the other hand, the appellees say that the demurrer was properly sustained to the bill by the circuit court, on the ground that each one of the four plaintiffs had a separate and distinct claim against the defendants, and hence could not unite in one bill, and, such being the case, they could not, *a fortiori*, maintain a creditors' bill; and that the suit could not be properly defended by the defendants without filing a separate answer in each case, which would require probably two hundred answers; and that the doctrine of the equitable jurisdiction of courts of equity to prevent a multiplicity of suits

has no application to such a case as this, and that in this case the court is obliged to go back to the execution by each individual of his distinct and separate contract with the company, investigate the circumstances ⁴⁵⁹ under which it was made, and determine upon its validity.

Citing Campbell, C. J., as holding that in *Winslow v. Jenness*, 64 Mich. 84: "The general rule in equity is that several grievances must be redressed by several proceedings, the only recognized exceptions being when a single right is asserted on one side, which affects all the parties on the other side in the same way, or a single wrong is complained of, which falls on them all simultaneously and together. Familiar instances are rights in common which are resisted by the owner of the estate on which it is charged, tax-rolls assessing all parties on an equal ratio, and fraud by trustees affecting all the beneficiaries. If there is any distinction in the proportion or character of the several grievances, there can be no joinder." And citing *Gray v. Rothschild*, 112 N. Y. 668, as holding that parties claiming to have been defrauded by similar, but not the same, representations, could not unite, as each had a separate cause of action; and that the statement by Mr. Cook, in section 156 of his book on stockholders, that several stockholders defrauded in the same way may join in the bill as co-complainants, is only a conjecture by him, and incorrect in the light of recent decisions; and that it was held by Lord Eldon, in *Jones v. Garcia del Rio*, 1 Turn. & R. 297, in a case identical with this case, that the plaintiffs could not join, nor sue on behalf of themselves and others; "that the plaintiffs, if they had any demand at all, had each a demand at law, and each a several demand in equity; that they could not file a bill on behalf of themselves and the other holders of scrip; and, as they were unable to do that, they could not, having three distinct demands, file one bill—and upon that ground alone . . . dissolved the injunction." And citing and relying on the rulings of this court in the recent case of *Norfolk etc. R. R. Co. v. Smoot* 81 Va. 495: "That two or more parties having distinct causes of action against the same defendant, cannot join in one suit to enforce ⁴⁶⁰ their rights. To enable plaintiffs to join in one suit, they must have a community of interest, such as to establish a street, or to have obstructions in an existing street removed, or as taxpayers, to restrain municipal corporations and their officers from transcending their powers in a way injurious to taxpayers."

In considering the single question in dispute as to this appeal, stated above, we will observe that is a general rule of law that if a person is induced to enter into a contract by false representations, fraudulently made by the other contracting party or his agent, the contract is voidable at the option of the innocent party. The rule applies with full force both to contracts of membership and to contracts to purchase, or to take shares in a corporation at a future time. It may be stated, as a general rule, that if a subscription for shares was obtained by fraudulent representations, it may be annulled by the subscriber at any time before other equities have intervened. Lord Romilly said (*Central Ry. Co. v. Kirsch*, L. R. 2 H. L. 99), in considering the right of a person to be relieved of shares which he had taken upon the faith of a fraudulent prospectus issued by the company: "Contracts of this description, between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like contracts between any two individuals. If one man makes a false statement which misleads another, the way in which that is to be treated affords the example for the way in which a contract is to be treated when a company makes a false statement which misleads an individual": 1 Morawetz on Private Corporations, sec. 95. A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation itself. Every person, acting by whatever name in the forming and establishing ⁴⁶¹ of a company at any period prior to the company, is considered in law as occupying a fiduciary relation towards the corporation. He is an agent of the corporation, and is subject to the disabilities of such. He is guilty of a breach of trust if he sells property to the corporation, purchased after he began promoting, without informing the company that the property belongs to him; or he may commit a breach of trust by accepting a *bonus* or commission from a person who sells property to the corporation. The law is rigid in its protection of the corporation and stockholders: Cook on Stocks and Stockholders, sec. 657. When a stockholder has been defrauded by such trustees, and seeks redress against the fraud, it is no answer to say that by proper inquiry he might have learned the truth, or by more vigilance he might have discovered the deception; and, when

the representations are by a prospectus, he is not obliged to investigate for himself, and investigate the truth of representations, to protect himself against the charge of negligence. But the principle of law that fraud vitiates all contracts, applies to a contract of subscription, and such contract is voidable for fraud at the option or election of the person defrauded. There are several remedies which are open to a subscriber induced to subscribe by fraud. One is—as pursued in this case—by bill in equity to restrain suits at law upon his undertakings, and to set aside the subscription contract, and also, if he wishes, to recover back payments already made on the subscriptions. And it is said by Mr. Cook, in his valuable book on Stocks and Stockholders, and corporation law, that this is the most fair, safe, and complete remedy that the subscriber has. It is a decisive notice to the corporation and all third parties not to rely on the subscription in question. It enables the subscriber to set aside the contract, to enjoin action at law for calls, and to recover back payments made before the discovery of the fraud. It is the customary, and, it seems, favorite, remedy in England, and ⁴⁶² has been clearly upheld in this country. The complainant in such a bill in equity, to set aside a subscription obtained by fraud, cannot sue in behalf of himself and such others as may choose to come in; but several subscribers defrauded in the same way may join in a bill as co-complainants. The corporation is to be a defendant; and if merely a cancellation of a subscription and an injunction against suits at law are sought, the corporation, it seems, may be the sole defendant. A court of equity in these actions will give complete relief by decreeing that the directors guilty of the fraud shall refund to the subscriber payments made by him before discovery of the fraud. This relief dispenses with an action at law for damages for deceit, and when sought for in the bill in equity the guilty directors must be made parties; and the bill is not multifarious by reason of its blending prayers for these various kinds of relief: Cook on Stocks and Stockholders, secs. 150, 156; citing *Reese River etc. Co. v. Smith*, L. R. 4 H. L. 64; *Hallows v. Fernie*, L. R. 3 Ch. App. 467; *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188.

In the case of *Brinkerhoff v. Brown*, 6 Johns. Ch. 151, Chancellor Kent said, upon this question of the misjoinder of plaintiffs: "There is no sound reason for requiring the judgment creditors to separate in their suits, when they have one com-

mon object in view, which in fact governs the whole case. There is no particular matter in litigation peculiar to each plaintiff; and if they be required to sue separately, it may be pertinently asked, *cui bono*? Their rights are already established, and the subject in dispute may be said to be joint, as between the plaintiffs on the one hand and the defendants on the other, charged with a combination to delay, hinder, and defraud their creditors. If each judgment creditor was to be obliged to file his separate bill, it would be bringing the same question of fraud into repeated discussion, which would exhaust the fund, and be productive of all the mischief and ⁴⁶⁸ oppression attending a multiplicity of suits. It appears to me, therefore, that the judgment creditors, in cases of fraud in the original debtor, have a right to unite in one bill to detect and suppress that fraud (citing the chief baron in *Ward v. Duke of Northumberland*, 2 Anstr. 469, as agreeing that unconnected parties might be joined in one suit, where there was a common interest among them all, centering in the point in issue in the cause). And if I am not mistaken it is the case in the present suit as respects the plaintiffs. The *gravamen* of the bill is fraud, equally injurious to all the plaintiffs, and their interests all center on that point": See the opinion and the cases cited.

Saying further: "There was a series of acts on the part of the persons concerned in this Genessee company, all produced by the same fraudulent intent, and terminating in the deception and injury of the plaintiffs. The defendants performed different parts in the same drama, but it was still one piece—one entire performance—marked by different scenes"; and "that the subject matter of the bill and of the relief, and the only matter in litigation, is the fraud charged," etc. The learned chancellor further observes that the rules of pleading in chancery are not so precise and strict as at law, and are more flexible in their modification, and can more readily be made to suit the equity of the case and the policy of the court; and that the case, also, of creditors suing on behalf of themselves and all others is another instance of the relaxation of the severity of a general rule of pleading.

Mr. Justice Story, in his work on Equity Pleading, section 279, speaking of the objection to a bill for multifariousness upon the misjoinder of plaintiffs, says that the principle applies to an improper joinder of plaintiffs, who claim no common interests, but assert distinct and several claims against

one and the same defendant. If several distinct holders of scrip or shares in a loan should sue on behalf of themselves ⁴⁶⁴ and all others, to have their subscriptions refunded, the bill would be multifarious, for their interests and demands are distinct and several. But the objection of misjoinder does not apply where all the parties plaintiff have an interest in the suit, although it is not a co-extensive interest.

Another exception to the general doctrine respecting multifariousness and misjoinder, which has already been alluded to, is when the parties (either the plaintiffs or defendants) have one common interest touching the matter of the bill, although they claim under distinct titles and have independent interests. Mr. Pomeroy, in his work on Equity Jurisprudence, has examined this subject with great ability, and maintains the jurisdiction on behalf of persons having a common interest in the subject of the suit, and in cases where there is a community of interest in the question at issue, and perhaps in the kind of relief sought, only: Pomeroy's Equity Jurisprudence, sec. 269. If the claims are distinct, and grow out of different transactions, it has been denied that the plaintiffs may unite—join as plaintiffs—against a common defendant because their claims are similar, as we have seen, as in *Jones v. Garcia del Rio*, 1 Turn. & R. 297, where each had a demand at law, and each a several demand in equity. Where the fraudulent acts complained of are different and unconnected, the joinder is not allowed, because they are distinct and separate, although similar, as where agents procure subscriptions by fraudulent representations at different times and under varying circumstances, although similar in their general scope, because the defense is different and the acts are different and distinct, and the proofs are necessarily different, each dependent upon its own circumstances. But in a case like the one made by this bill, where the parties allege in the bill that the fraudulent acts are exactly the same, and perpetrated by the same means, and the injury identical as to all, except only in the amount of the injury—as where the same false statements are distributed ⁴⁶⁵ to all, and the same false and deceitful prospectus is operated upon all alike, and all have been defrauded by the same means, and the relief sought is the same, and the subject matter identically the same—there is a community of interest and right, and such persons may unite as co-plaintiffs against the common wrongdoer. If this were not so, it is difficult to see how relief could be had

at all. In so many holdings many are necessarily small, and the whole interest destroyed inevitably in an effort to redress an admitted wrong.

The bill in this case is most skillfully drawn, evidently in the light of the authorities, and is in accordance with principles well established in the law, and not defective, nor liable to demurrer. The case stated therein is one calling loudly for relief in equity, and the plaintiffs are properly joined. Whether the proofs can be adduced to sustain its charges is a question we do not now propose to decide; but the decree of the circuit court, sustaining the demurrer, is, we think, erroneous, and for that reason the same will be reversed, and the cause remanded to the said circuit court, there to be considered upon the merits and for final decree therein, as that may appear right upon the hearing.

Decree reversed.

CORPORATIONS—SUBSCRIPTIONS TO STOCK OBTAINED BY FRAUD—RIGHT TO AVOID.—This question will be found thoroughly treated in the extended notes to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 824; *Parker v. Thomas*, 81 Am. Dec. 401; *Clem v. Newcastle etc. R. R. Co.*, 68 Am. Dec. 654, and *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 96. While false statements of an authorized agent of a corporation in regard to the past or present status of the corporate enterprise whereby a subscription to its stock is obtained may be fraudulent and defeat a recovery thereon, representations concerning its future expectations will not have that effect: *Armstrong v. Karschner*, 47 Ohio St. 276. One who has been induced to subscribe for corporate stock by fraudulent representations cannot recover the amount paid until the claims of creditors of the corporation are satisfied: *Turner v. Grangers etc. Ins. Co.*, 65 Ga. 649; 38 Am. Rep. 801, and note; *Howard v. Turner*, 155 Pa. St. 349; 35 Am. St. Rep. 883. A promoter of a corporation is liable on his promise to refund a subscription, where the terms of his promise whereby the subscription was obtained are not carried out: *Allison v. Wood*, 147 Pa. St. 197; 30 Am. St. Rep. 726.

CORPORATIONS—PROMOTERS AS AGENTS.—Promoters of a corporation who, on its formation, become officers thereof, must be treated as its agents and trustees, and held accountable to it for any profits which they realize upon property bought for and sold to the corporation: *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307; 17 Am. St. Rep. 149, and extended note; note to *Memphis etc. R. R. Co. v. Wood*, 16 Am. St. Rep. 98.

CORPORATIONS—JOINDER IN SUITS TO SET ASIDE SUBSCRIPTIONS TO.—Where two persons purchase stock in a corporation at the same time and under one arrangement and the false representations inducing such purchase were made to them jointly, they may join in a bill to set aside such purchase on the ground of such false representations: *Sherman v. American Stove Co.*, 85 Mich. 169.

GIBSON v. GREEN'S ADMINISTRATOR.

[39 VIRGINIA, 524.]

STATUTE OF LIMITATIONS TO BE AVAILED OF MUST BE PLEADED.

JUDGMENT, MERGER.—THE RECOVERY OF JUDGMENT ON A DEBT SECURED BY A TRUST DEED does not merge such debt so that it is no longer secured by the deed.

TRUST DEED.—NEITHER THE RUNNING OF THE STATUTE OF LIMITATIONS against a debt secured by a trust deed, nor the recovery of judgment on such debt, nor any lapse of time short of the period sufficient to raise the presumption of payment, deprives the party of his right to enforce the trust for the purpose of compelling payment of the debt.

RES JUDICATA.—A BILL FOR THE RESETTLEMENT OF THE ADMINISTRATION ACCOUNT of a decedent must be denied if the same matters were at issue and determined in a previous suit between the same parties.

A BILL OF REVIEW DOES NOT LIE IN FAVOR OF AN ASSIGNEE.

SUIT in equity by J. C. Gibson and wife against J. A. Brooke, administrator of the estate of John Cook Green, deceased, and others. The complainants aver the execution in 1867 by Mrs. Gibson, then Miss Shackelford, and Lucy B. Shackelford of a deed of trust of certain lands to secure a bond in favor of the administrator of F. J. Thompson, deceased; that judgment was obtained on this bond in September, 1876, in the circuit court of Culpeper county; that the lands had been advertised to be sold by the trustees under such trust deed; that the debt secured by the deed had become merged in the judgment, and thereby extinguished. The complainants asked for an injunction to prohibit the sale threatened by the trustees of the trust deed. An amended bill was filed in 1886 stating that one S. W. Thompson, a distributee of the estate of F. J. Thompson, deceased, had assigned all his interest therein to Mrs. Gibson, and averring that a number of bonds and other choses in action belonging to the estate had gone into the administrator's hands, and had not been accounted for. The amended bill prayed for a resettlement of the administration accounts. The administrator demurred to the bill and also answered both the original and amended bills, and filed a plea of *res judicata*. On the hearing an injunction previously issued was dissolved and the bills dismissed. The complainants appealed.

J. C. Gibson and James Lyons, for the appellants.

G. D. Gray, for the appellees.

526 LEWIS, P. In the petition for appeal the point is for the first time made that not only was the debt secured by

the deed of trust merged in the judgment, but that the judgment is barred by the statute of limitations; and on this ground it is contended that the injunction ought to have been perpetuated.

This position is untenable. In the first place, no mention of the statute is made in the pleadings, and nothing is better settled than that the statute, to be availed of, must be pleaded: *Hickman v. Stout*, 2 Leigh, 6; *Smith v. Hutchinson*, 78 Va. 683. Indeed, not only was the statute not relied on in the court below, but the amended bill prays specifically that proceedings under the deed of trust be enjoined, and that the parties entitled to the judgment be required to enforce it in the usual way.

It is moreover a general rule, universally recognized, that a decree has to be founded on the *allegata* as well as the *probata* of the case; otherwise the pleadings, instead of being a shield to protect parties from surprise, would be a snare to entrap them: *Putnam v. Day*, 22 Wall. 60; *Mundy v. Vawter*, 3 Gratt. 518; 1 Barton's Chancery Practice, 260.

But according to the rule established in Virginia, the debt was not merged in the judgment, nor was the deed of trust security in any way affected by the judgment. Undoubtedly, the bond, the original evidence of the debt, was merged in the judgment, but the character of the debt was not changed; that remained the same. This court has repeatedly called attention to the distinction between a mortgage, deed of trust, and a vendor's lien, and mere personal securities for the payment of money of any class or grade whatever. And the rule has been recognized that no change in the evidence of the debt, or anything short of actual payment or an express release will operate to discharge the lien; that the latter remains until the debt is satisfied, and is not affected by a judgment at law merging the original evidence of the debt: 2 Jones on Mortgages, sec. 924; *Hanna v. Wilson*, 3 Gratt. 243; 46 Am. Dec. 190; *Coles v. Withers*, 33 Gratt. 186; *Bowis v. Poor School Society*, 75 Va. 300; *Stimpson v. Bishop*, 92 Va. 190.

Accordingly, it has been expressly decided that although the evidence of the debt has been merged in a judgment, and although the judgment is actually barred by the statute of limitations, yet that the remedy in equity to enforce the lien is not affected by any lapse of time short of the period sufficient to raise the presumption of payment: *Paxton v. Rich*, 85 Va. 378; *Bank of Metropolis v. Guttschlick*, 14 Pet. 19. The

limitation prescribed by section 2935 of the code of 1887 has no application to the present case.

As to the prayer of the amended bill for a resettlement of the administration accounts of John Cook Green, deceased, that is fully met by the plea of *res judicata*. The very matters thus sought to be litigated were in issue in the suit of *Green v. Thompson*, 84 Va. 376, decided here in January, 1888, to which suit all the parties to the present suit were parties. In that case the bill charged that the administrator had not fully accounted for all the assets that went into his hands, and the circuit court ordered an account, in conformity with the prayer of the bill. But this court, on appeal, reversed the decree and dismissed the bill, not only on the ground of laches and lapse of time, but because ⁵²⁸ the record itself showed the correctness of the settled accounts. The appellants, having been parties to that suit, are bound by the decree therein, and cannot now, in an independent suit, reopen what was finally settled by that decree.

The result, moreover, would be the same were the amended bill in this case treated as a bill of review on the ground of newly discovered evidence. There is no distinct allegation as to when the receipt relied on was first discovered, nor is it alleged that by the use of reasonable diligence it could not have been produced in time to have been used in the original cause; nor does it contain anything which could have produced a different result had it been brought forward in time.

But the amended bill cannot be treated as a bill of review. The female complainant, so far as the prayer for a resettlement of the administration accounts is concerned, is claiming as the assignee of Samuel W. Thompson, the plaintiff in the Thompson suit, and a bill of review does not lie for assignees: *Thompson v. Maxwell*, 95 U. S. 391; *Armstead v. Bailey*, 83 Va. 242.

Decree affirmed.

LIMITATIONS OF ACTIONS.—PLEADING.—The statute of limitations, to be available, must be specially pleaded: *Curtiss v. Etna etc. Ins. Co.*, 90 Cal. 245; 25 Am. St. Rep. 114; *Johnson v. Cooper*, 2 Yerg. 524; 24 Am. Dec. 502; *Parker v. Kane*, 4 Wis. 1; 65 Am. Dec. 283, and note; *Wilkinson v. Flowers*, 37 Miss. 579; 75 Am. Dec. 78, and note; *Waggoner v. Jermaine*, 3 Denio, 306; 45 Am. Dec. 474. Limitation does not extinguish a contract, but is a defense in bar to a recovery upon it, and must always be pleaded: *Wassell v. Reardon*, 11 Ark. 705; 54 Am. Dec. 245, and note; *Backus v. Clark*, 1 Kan. 303; 83 Am. Dec. 437; *Chiles v. Drake*, 2 Met. 146; 74 Am. Dec. 406, and note.

JUDGMENT—MERGER—COLLATERAL SECURITY.—If the maker of a promissory note agrees to procure an indorser thereof, and fails to do so, and an action is brought against him on this agreement, and a judgment recovered, in which the damages are assessed at a sum equal to the amount due on the note, such judgment remaining unsatisfied, will not preclude a recovery on the note for the amount thereof: *Vauzem v. Burr*, 151 Mass. 386; 21 Am. St. Rep. 458. The lien of a mortgage is not merged in a judgment of foreclosure: *Evansville Gas-Light Co. v. State*, 73 Ind. 219; 38 Am. Rep. 129, and extended note. See, also, the note to *Clark v. Ruwling*, 63 Am. Dec. 300.

COLLATERAL SECURITY—STATUTE OF LIMITATIONS.—A deposit of collaterals does not prevent or impede the running of the statute of limitations upon the debts secured thereby, but the barring of any action upon such debt through the running of the statute of limitations does not affect the right of the pledgee to hold and realize upon the collateral, nor of the pledgor to call for any surplus remaining after the principal debt has been paid: *Hartranft's Estate*, 153 Pa. St. 530; 34 Am. St. Rep. 717, and note.

FICKLIN'S ADMINISTRATOR v. RIXEY.

[89 VIRGINIA, 322.]

THE RIGHT OF DOWER IS AN EXISTING LIEN OR ENCUMBRANCE and not a mere possibility or contingency, which is to be deemed an encumbrance only when it becomes consummate by the death of the husband.

A RIGHT OF DOWER IS SUPERIOR TO ALL JUDGMENT LIENS ACCRUING AFTER THE MARRIAGE.

A POST-NUPTIAL SETTLEMENT UPON CONSIDERATION OF THE RELEASE OF THE WIFE'S RIGHT OF DOWER, or upon any other valuable consideration, is good in equity though void by the common law, and the husband's creditors by judgments recovered after his marriage are bound by such settlement.

James G. Field, for the appellants.

Rixey and Barbour, for the appellees.

823 LEWIS, P. In 1868 Richard S. Rixey, being seised in fee of a tract of land containing eight hundred and fifteen acres, settled upon his wife two hundred and seventy acres thereof, in consideration of the relinquishment of her right of dower in the residue of his real estate. At the time of this settlement there were sundry docketed judgments against him, but which had been obtained subsequent to his marriage. The object of the present suit was to subject the whole of the land to the satisfaction of these judgments. In the progress of the cause a commissioner of the court reported that the value of the two hundred and seventy acres, at the time of the settlement, was fourteen hundred and seventeen dollars and fifty cents, and that the value of the dower relinquished

was then fifteen hundred and thirty-five dollars and twenty-five cents. There was no exception to the report in this particular, and the report was confirmed. The only ground of exception was that the judgments were paramount to the deed of settlement, because prior in time—in other words, that the liens of the judgments, which originally attached to the two hundred and seventy acres, could not be displaced or impaired by the subsequent settlement; and this is the single question we have to determine.

Mrs. Rixey having died, the circuit court decreed, when the cause came on to be finally heard, that her heirs at law are entitled to the two hundred and seventy acres "free of and discharged from all liability for the debts of S. Richard Rixey."

We are of opinion that there is no error in this decree. The position of the appellants (the judgment creditors) is founded upon a misconception of the real nature of the inchoate right of dower. Notwithstanding the *dictum* of Judge Story to the contrary, in *Powell v. Monson Mfg. Co.*, 8 Mason, 347, and some express decisions to the same effect, it is now settled law that such a right is not a mere possibility or contingency, which is to be deemed an encumbrance only when it becomes consummate by the death of the husband, ⁸²⁴ but that it is an existing lien or encumbrance; and upon this ground it has been often determined that a covenant against encumbrances is broken by the existence of a right of dower, whether inchoate or consummate: *Shearer v. Ranger*, 22 Pick. 447; *Bigelow v. Hubbard*, 97 Mass. 195; *Porter v. Noyes*, 2 Greenl. 22, 11 Am. Dec. 30, and note; Rawle on Covenants for Title, 4th ed., 96, and cases cited.

The lien, of course, is inferior to all liens on the land which attached prior to the marriage, but it is superior to those which are acquired after the marriage without the wife's consent, including judgments: 2 Minor's Institutes, 4th ed., 182; Stewart's Husband and Wife, sec. 258.

The settlement in question, then, being founded on a consideration paramount to the appellants' judgments, its validity must be determined upon grounds independent of the judgments; and upon this point there is no difficulty.

It is a settled doctrine, repeatedly recognized by this court, that a post-nuptial settlement in favor of a wife, upon a valuable consideration, is good in equity, though void at common law; and the relinquishment of the wife's right of dower is a

good consideration for such a settlement as against creditors of the husband, to the extent of the value of the dower: *Harvey v. Alexander*, 1 Rand. 219; 10 Am. Dec. 519; *Quarles v. Lacy*, 4 Munf. 251; *William & Mary College v. Powell*, 12 Gratt. 372; *Davis v. Davis*, 25 Gratt. 587; *Yates v. Law*, 86 Va. 117; *De Farges v. Ryland*, 87 Va. 404; 24 Am. St. Rep. 659. Indeed, as was said in *Davis v. Davis*, 25 Gratt. 587, courts of equity view such settlements liberally in favor of the wife, and will not interfere at the instance of creditors, unless the estimated value of the dower interest relinquished be shown to be excessive.

In the present case it appears from the commissioner's report that the value of the dower exceeded that of the land settled on the wife, and, as there was no exception to the report on that ground in the court below, the finding of the commissioner is conclusive here: *Simmons v. Simmons*, 33 Gratt. 451; *Robinson v. Allen*, 85 Va. 721; *Topliff v. Topliff*, 145 U. S. 156, 173.

Decree affirmed.

DOWER, PRIORITY OF, AS REGARDS OTHER RIGHTS.—Dower is paramount to all conveyances, contracts, encumbrances, debts, or liabilities of the husband, executed or incurred by him during the existence of the coverture: *Higginbotham v. Cornwell*, 8 Gratt. 83; 56 Am. Dec. 130. In *Shell v. Duncan*, 31 S. C. 547, this question underwent an elaborate discussion, and it was held that the inchoate right of dower was a substantial right of property, and not a mere lien, and that this right, if it attached before a tax lien, was paramount thereto. At page 565 of the report, Mr. Justice McGowan mentions an unreported case, *Prescott v. Hubbell*, decided in the same state, where it was held that the renunciation of a wife's inchoate right of dower was a sufficient consideration to support an apparently voluntary deed from the husband to the wife as against the husband's creditors. In such a case, the true consideration, the relinquishment of dower may be shown by parol: *Bullard v. Briggs*, 7 Pick. 533; 19 Am. Dec. 292; and, if the value of the property settled exceeds the value of the dower, the deed of settlement should be vacated only as to the excess: *Burwell v. Lumsden*, 24 Gratt. 443; 13 Am. Rep. 643.

GRAYBILL v. BRUGH.

[89 VIRGINIA, 895.]

A NAKED OPTION TO BUY LANDS IS NOT AN INTEREST THEREIN which a purchaser for value is bound to notice, or which equity will regard. Such a contract is not favored in equity, and the want of mutuality may generally be urged as a bar to its specific enforcement.

SPECIFIC PERFORMANCE OF A CONTRACT TO SELL AND CONVEY LAND CANNOT ORDINARILY BE DECREED AGAINST A MARRIED MAN if his wife refuses to join in the deed, there being no proof of fraud on his part in her refusal, unless the purchaser is willing to pay the whole purchase price, and accept a conveyance in which she does not unite.

MARRIED WOMAN IS IN NO WAY BOUND BY AN OPTION TO PURCHASE her lands given by her husband, against which she protests as soon as it comes to her knowledge.

SUIT by E. J. Brugh against Mary W. T. Graybill and her husband, and one A. Nash Johnston. Decree in favor of the complainant. The defendant appealed.

Benjamin Haden, for the appellants.

Edmund Pendleton, for the appellee.

895 FAUNTLEROY, J. It appears from the record in this case that on the twelfth day of March, 1888, Lewis H. Graybill bought of J. H. H. Figgat, special commissioner of the circuit court of Botetourt county, in the cause therein pending of J. P. Thrasher against Bierly, a tract of land in Botetourt county, Virginia, containing about fifty acres; that on the third day of February, 1890, before the purchase money had all been paid, and before any deed had been made to Graybill for this land, the said Graybill gave to E. J. Brugh an option, in writing and under seal, for the purchase of this land by Brugh, for the nominal consideration of one dollar, but in fact, nothing, it is admitted, was ever paid to Graybill by Brugh—not even the one dollar—for the said option.

On the 20th of March, 1890, J. H. H. Figgat, the commissioner aforesaid, upon the payment of the purchase money for the land, by the judicial purchaser, Lewis H. Graybill, conveyed the land to Mary W. T. Graybill, the wife of Lewis H. Graybill, by the direction of the said Graybill, as he was ordered by the decree of sale to do. On the twenty-second day of March, 1890, Lewis H. Graybill and wife conveyed this land to A. Nash Johnston for two thousand dollars. At the time of this purchase Johnston was informed that Lewis H. Graybill had given an option to E. J. Brugh on this land

for the period of ten months from February 8, 1890; but that nothing had been paid by Brugh on said option, and that it bound Brugh to pay or to do nothing whatever, and it was, therefore, not binding on Lewis H. Graybill.

At the April rules, 1890, of the circuit court of Botetourt county, E. J. Brugh filed his bill in this suit, asserting the said option as a binding contract, which he prayed to have specifically performed, and that the deed from J. H. H. Figgat, commissioner, to Mary W. T. Graybill, and the deed from ^{say} Lewis H. Graybill and Mary W. T. Graybill, his wife, to A. Nash Johnston, be set aside, vacated, and annulled; and charging Mrs. Graybill, Lewis H. Graybill, A. Nash Johnston, and J. H. H. Figgat, commissioner, with notice of his option, and with fraud in the execution of the deeds aforesaid.

The said parties filed their demurrers and answers, and denied the allegations and equities of the bill. And the circuit court of Botetourt, by the decrees complained of, decided that both Mrs. Graybill and A. Nash Johnston had notice of the said option at the time of receiving their respective deeds, and that the said option is an enforceable contract, and binding on all the parties, including A. Nash Johnston; and directing A. Nash Johnston to convey the land to E. J. Brugh, without retaining a lien on the land, upon the payment by E. J. Brugh of the cash payment and first deferred payment, and executing bonds for the second and third deferred payments of the purchase money, "with security approved by the clerk of this court," etc.—thereby substituting for the vendor's lien to secure the deferred payments of the purchase money mere personal security; and that, too, not such as might be satisfactory to the parties interested, nor such as should be approved by the court, but "with security approved by the clerk," etc. Johnston did not buy the land from Lewis H. Graybill, but from Mrs. Mary W. T. Graybill. Lewis H. Graybill never had any title to the land, and the interest of Brugh, if any, by virtue of a mere naked option to buy, which did not bind him to buy in any event whatever, was not such an interest in the subject of which a purchaser for value is bound to notice, or which equity will regard: 2 Pomeroy's Equity Jurisprudence, sec. 692. "Unilateral or option contracts are not favored in equity, and the want of mutuality of obligation and risk may generally be urged as a bar to their specific enforcement": 2 Warvell on Vendors,

769. "Equity requires an actual ^{see} consideration, and permits the want of it to be shown, notwithstanding the seal, and applies the doctrine to covenants, settlements, and executory agreements of every description": 1 Pomeroy's Equity Jurisprudence, sec. 383. "In respect to voluntary contracts or such as are not founded in a valuable consideration, courts of equity do not interfere to enforce them as against the party himself, or as against volunteers claiming under him": Story's Equity Jurisprudence, sec. 706 a.

In *Duval v. Bibb*, 4 Hen. & M. 116, 4 Am. Dec. 506, it was held that in equity either party to a deed may aver and prove against the other the true and actual consideration on which the deed was founded, though a different consideration be expressed therein. Equity disregards the form, and looks to the substance. The nominal consideration of one dollar in the option, it is admitted, was never paid; and the option says: "It is agreed by the parties hereto that there shall be no obligation upon the said E. J. Brugh, by virtue of this agreement, unless within the period of the said ten months he pays one-third of the purchase money." He did not sign the option, and it did not bind him to do anything. He attempted to make a large profit on an investment of nothing, and without the obligation to do anything, and he simply failed. The complainant's bill should have been dismissed in the circuit court for want of mutuality of obligation in the option sued upon. It professes to bind one of the parties absolutely, and stipulates only for the indefinite pleasure of the other, and it cannot, therefore, be specifically enforced: *Ford v. Euker*, 86 Va. 79. It moreover appears that neither party contemplated a sale, subject to the wife, Mrs. Graybill's, contingent right of dower, and in this respect, this case is ruled by the case of *Dunsmore v. Lyle*, 87 Va. 391, where specific performance was refused, even though the bill offered to take a deed from Lyle, subject to the wife's dower. In this case the complainant, Brugh, ^{see} seeks to enforce a conveyance of the land free from the dower interest of Mrs. Graybill, who never signed the option, and who, on hearing of it, interposed her remonstrance immediately, and communicated her refusal to be bound by it to Brugh. "Specific execution of an agreement to sell and convey will not, ordinarily, be decreed against a vendor, a married man whose wife refuses to join in the deed, where there is no proof of fraud on his part in her refusal, unless the purchaser is willing to pay the full purchase

money and accept the deed without her joining": 2 Warvell on Vendors, 769. See *Clarke v. Reins*, 12 Gratt. 98.

Mrs. Graybill held the legal title to the land, and she is in no manner bound by the "option" of her husband to which she was not a party and against which she protested from the first moment that it came to her knowledge: *Dunsmore v. Lyle*, 87 Va. 391; *McCann v. Janes*, 1 Rob. (Va.) 256; *Clarke v. Reins*, 12 Gratt. 98; *Booten v. Scheffer*, 21 Gratt. 474; *Chilhowie Iron Co. v. Gardiner*, 79 Va. 305; *Litterall v. Jackson*, 80 Va. 604; *Cheatham v. Cheatham*, 81 Va. 895; *Shenandoah Valley R. R. Co. v. Dunlap*, 86 Va. 346. The circuit court erred in overruling the demurrer of Graybill and wife to the complainant's bill; and we are of opinion that the decrees appealed from are wholly erroneous, and our judgment is to reverse and annul them and to enter a decree here dismissing the complainant's bill.

Decrees reversed.

SPECIFIC PERFORMANCE OF CONTRACT FOR PURCHASE OF LAND AT OPTION OF VENDER, WHEN MAY BE ENFORCED: *Corson v. Mulvany*, 49 Pa. St. 88; 88 Am. Dec. 485; *Idle v. Leiser*, 10 Mont. 5; 24 Am. St. Rep. 17; *Ross v. Parks*, 93 Ala. 153; 30 Am. St. Rep. 47; *Warren v. Castello*, 109 Mo. 338; 32 Am. St. Rep. 669.

SPECIFIC PERFORMANCE—EFFECT OF WIFE'S REFUSAL TO JOIN IN DEED. Where a wife refuses to join in a deed of land which her husband has contracted to convey, the vendee cannot compel specific performance by the husband alone and retain part of the purchase money as indemnity against the wife's contingent claim for dower: *Burk's Appeal*, 75 Pa. St. 141; 15 Am. Rep. 587.

COTTRELL v. WATKINS.

[29 VIRGINIA, 801.]

LACHES.—ONE COMMENCING A SUIT WITHIN TWO AND A HALF YEARS after the making of a deed to set it aside for fraud is not precluded by laches from maintaining such suit. The defense of laches is in equity only permitted to defeat an acknowledged right on the ground of its affording evidence that the right has been abandoned.

NEGOTIABLE INSTRUMENTS.—AN INDORSER OF AN ACCOMMODATION NOTE after maturity, with or without knowledge of its consideration, may enforce it against the prior parties to the same extent as if it had been executed for value, if his immediate indorser was entitled to so enforce it.

NEGOTIABLE INSTRUMENTS—ACCOMMODATION PAPER.—If the person for whose benefit accommodation notes are made pays them off as they fall due, but, instead of canceling them, passes them to a third person, they cannot be enforced by him, and if they are enforced by means of the
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sale of property under a trust deed given to secure their payment, such sale is fraudulent, and will be vacated in equity.

NEGOTIABLE INSTRUMENTS.—ACCOMMODATION PAPER TRANSFERRED AFTER MATURITY is subject to the same defenses as if it had been given for value, including the defense of its payment before such transfer by the person for whose benefit it was made.

SUIT to set aside a trustee's sale. Decree for the defendant.

J. H. Webb Peplow, for the appellants.

Page and Carter, for the appellees.

§ 97 **RICHARDSON, J.** The first and main question in the case is, Did the court below err in its said decree of December 1, 1891, sustaining the demurrer of the defendants to the bill of the plaintiffs, and in dismissing the said bill? This question can receive none other than an affirmative answer. It is unquestionably true that the plaintiffs' bill is inartificially drawn; but the real question is, not as to the mere form, but as to the substance of the case presented by the original and amended bills. Throwing aside all mere extraneous matter, the case made is substantially this:

Joseph F. Cottrell failed in business in the year 1873, and was indebted to the Clover Hill Railroad Company in the sum of about twelve hundred and sixty-two dollars and two cents; that in order to aid and assist the said Joseph F. Cottrell in paying off and discharging said debt, and for his accommodation, without any consideration whatever, his brother, John W. Cottrell, the appellant here, made his three negotiable notes, amounting in the aggregate to said Joseph F. Cottrell's indebtedness to said railroad company; that said notes were each dated on the seventh day of April, 1874, and were made payable to Benjamin Cottrell, another brother, at six, ten, and fourteen months, respectively, from date; said notes were indorsed by said Benjamin Cottrell and passed to and accepted by said railroad company in full payment of the indebtedness aforesaid of Joseph F. Cottrell to said company; and that by deed of even date with said notes, the appellant, John W. Cottrell, and Harriet Ann, his wife, conveyed to ~~see~~ John S. Wise and T. M. Logan, trustees, the tract of land in the bill and proceedings mentioned, in trust, to secure to said railroad company the payment of said three notes, which said trust deed was duly placed on record in the clerk's office of Henrico county.

That said Joseph F. Cottrell, though the real debtor to said

railroad company, was not a party to said notes, but, being the real debtor, he paid them off as they respectively became due, and said notes were delivered to him, when it became his duty to cancel, destroy, or deliver said notes to appellant, John W. Cottrell, the accommodation maker thereof; but, instead of so doing, he retained them in his possession, and afterwards passed them to the appellee, Charles T. Watkins, in the course of business transactions with him, but for what consideration, if any, does not appear.

That said notes remained in the possession of the appellee, Charles T. Watkins, until after the death of said Joseph F. Cottrell, when, some ten years after the maturity and payment of said notes, and after the purpose for which the said trust deed was executed had been accomplished, he (said Watkins) did, with intent to blind and deceive said trustees, and to defraud the appellant, John W. Cottrell, represent unto said trustees that he (the said appellee, Charles T. Watkins) was the lawful holder and owner of said notes secured as aforesaid, that the same remained unpaid, and that he (the said appellee, Charles T. Watkins) was entitled to have the land conveyed in said trust deed sold, in accordance with the terms and stipulations thereof; and that he thus procured the sale and conveyance of said land, and thereby perpetrated gross fraud upon the appellant, John W. Cottrell.

Such is, substantially, the case made by the bill. Taking as true the allegations of the bill (and upon demurrer they must be so taken), it would be difficult to conceive of a more meritorious case, or one more clearly commending itself to the favorable consideration and aid of a court conscience.

*** The decree under consideration states no ground upon which the court below sustained the demurrer of the defendants to the plaintiffs' bill; but in the petition for appeal it is stated that the chief grounds of demurrer relied on by the defendants in the court below were these: 1. That the notes secured by the deed of trust, being accommodation notes, were not subject to existing equities; 2. That the fraud charged upon the appellee, Watkins, is not sufficiently specific; 3. That as Joseph F. Cottrell, the original debtor, was dead, his personal representative should have been made a party defendant. And that the court, in an oral opinion, overruled each of the grounds of demurrer thus relied on by counsel for the defendants; but that the judge, of his own motion, suggested laches, and upon that ground sustained the demurrer.

This statement, though not strictly part of the record, is substantially admitted to be true in the elaborate note of argument filed by counsel for the appellee, Watkins. This was, to say the least, a singular ground upon which to sustain the demurrer and dismiss the bill. In view of the case made by the original bill, as amended, the doctrine of laches and lapse of time could have no application whatever. The object of the bill was to set aside and annul the sale and conveyance of the land mentioned in the trust deed, upon the grounds: 1. That the notes secured by said deed, and to pay which said sale was made, had been previously paid, at maturity, by Joseph F. Cottrell, the real debtor, for whose accommodation they were made, indorsed, and passed to said railroad company in payment of the debt due it by said Joseph F. Cottrell; 2. That having been thus paid at maturity, and the debt evidenced thereby extinguished, the notes could not thereafter be reissued or passed to the appellee, Watkins, or to any other person, so as to bind the antecedent parties, or either of them—namely, John W. Cottrell, the maker, and Benjamin Cottrell, the payee and ⁸¹⁰ indorser; 3. That said sale and conveyance were procured by the said Watkins through false and fraudulent representations made by him to said trustees, to the effect that he was the lawful owner of the notes, secured by said deed of trust, and that the same were unpaid.

The land in question was sold by the said trustees about the month of February, 1889, and on the 28th of March, 1889, was, by said trustees, conveyed to the purchaser, the appellee, Watkins; and this suit was brought in August, 1891—less than two years and a half after the sale and conveyance by said trustees. It is inconceivable, therefore, upon what principle it could be said that the appellant, John W. Cottrell, had been guilty of such laches as to bar his right to have a hearing in a court of equity touching the alleged gross fraud perpetrated upon him by said Watkins, and speedy relief upon proof of the case made by the bill.

Inasmuch, therefore, as the plaintiffs' right to maintain this suit was not barred by the statute of limitations, "it follows, as a necessary consequence, that laches and lapse of time constitute no such bar": *Foster v. Rison*, 17 Gratt. 335; *Coles v. Ballard*, 78 Va. 149; *Rowe v. Bentley*, 29 Gratt. 759. But it is useless to multiply authorities in support of a proposition so long and well established as is this. Moreover, the

bill in the present case presents a case of rank and outrageous fraud. The well-established doctrine is that "cases of fraud, trust, and mistake are not within the statute of limitations": *Hunter v. Spotswood*, 1 Wash. (Va.) 145; *Massie v. Heiskell*, 80 Va. 805. "The defense of laches is, in equity, only permitted to defeat an acknowledged right on the ground of it affording evidence that the right has been abandoned": *Nelson v. Carrington*, 4 Munf. 332-343; 6 Am. Dec. 519; *Massie v. Heiskell*, 80 Va. 805.

In the present case, the plaintiff below (the appellant here) was evidently taken by surprise, as he might well have been, when the court sustained the demurrer to his bill on the ^{§11} ground of laches; and hence it was that, at a subsequent day of the same term, he tended his second amended bill, in which he fully and clearly explained everything savoring of any laches or acquiescence, and moved the court to set aside the decree rendered at a previous day of the same term, and to allow him to file said amended bill. But this will be more particularly noticed when we come to consider the decree of December 18, 1891, refusing leave to file said second amended bill.

It appears, therefore, that, in considering the demurrer of the defendants to the plaintiffs' bill, the court below rejected all the grounds of demurrer relied on by counsel for the defendants, and upon its own motion sustained the demurrer, upon the ground of laches. And in this court the same counsel, seeming to take warning from the action of the court below, abandon the positions there urged, and rely mainly upon an exception in the case of an accommodation note to the general rule that, while a negotiable note may be transferred as well after as before it becomes due, the rights of the indorsee are very different in the two cases. The rule, and the exception thereto, is adverted to by Judge Moncure in *Davis v. Miller*, 14 Gratt., at pages 5 and 6, as follows: "A negotiable note may be transferred at any time while it remains a good, subsisting, unpaid note, whether before or after it has arrived at maturity (Story on Promissory Notes, sec. 178); and in the latter case, even though it be protested for nonpayment, and bear upon its face the marks of its dishonor. . . . But, though a negotiable note may be transferred as well after as before it comes due, the rights of the indorsee are very different in the two cases: 2 Rob. Pr., new ed., 252. In the case of a transfer of a note, before it becomes due, to a *bona fide*

holder for value, he takes it free of all equities between the antecedent parties of which he has no notice; and it has been held that even gross negligence would not ^{§13} alone deprive him of his right. He thus often acquires a better right than that of the indorser under whom he claims. In the case of a transfer of an overdue note, the holder takes it as a dishonored note, subject to all the defenses and equities to which it was subject in the hands of his immediate indorser, whether he has any notice thereof or not. He receives nothing but the title and rights of such indorser. An exception exists in the case of an accommodation note, which is said, in general, to be governed by the same rules as negotiable paper for consideration. So that a *bona fide* indorsee of such a note, whether before or after maturity, and though knowing it to be an accommodation note, may enforce it against the prior parties. In that case an indorsee of an overdue note acquires a right, though the indorser under whom he claims has none": Citing *Sturtevant v. Ford*, 4 Man. & G. 101; *Carruthers v. West*, 11 Ad. & E., N. S., 143; Story on Promissory Notes, sec. 178; 1 Parsons on Contracts, 213-217.

It is true that Story and Parsons, as well as other American text-writers, recognize the exception to the general rule here under consideration, and state the exception in substantially the same language as that employed by Judge Moncure in *Davis v. Miller*, 14 Gratt. 5, 6.

In Story on Promissory Notes, 6th edition, sec. 194, it is said: "The mere fact that an accommodation note has been indorsed, even after it became due, does not, of itself, without some other equity in the maker, defeat the rights of the holder. In short, the parties to every accommodation note hold themselves out to the public, by their signatures, to be absolutely bound to every person who shall take the same for value, to the same extent as if that value were personally advanced to them, or on their account, and at their request": Citing *Sturtevant v. Ford*, 4 Man. & G. 101, the first of the two cases referred to by Judge Moncure in *Davis v. Miller*, 14 Gratt. 5, 6, and *Thompson v. Shepherd*, 12 Met. 311; 46 Am. Dec. 676.

In 1 Daniel on Negotiable Instruments, edition 1876, section 726, it is said: ^{§13} "The general rule, that the purchaser of overdue paper can stand in no better position than his transferor, does not apply so far as to invalidate bills and notes drawn, indorsed, or accepted for accommodation, overdue at

the time they are negotiated or transferred, it being considered that parties to accommodation paper hold themselves out to the public, by their signatures, to be bound to every person who shall take the same for value, the same as if it were paid to themselves": Citing, in a note, *Charles v. Marsden*, 1 Taunt. 224, and *Sturtevant v. Ford*, 4 Man. & G. 101, and *Carruthers v. West*, 11 Ad. & E., N. S., 143, the last two being the cases referred to by Judge Moncure in *Davis v. Miller*, 14 Gratt. 5, 6. But the learned author proceeds to say: "And the fact that the purchaser knew that the paper was so drawn, indorsed, or accepted for accommodation does not weaken his position. This principle is well established in England, and it is to be regretted that the decisions in the United States do not uniformly follow the English rule." And in notes to this section the author cites, as favoring the doctrine of the text, *Charles v. Marsden*, 1 Taunt. 224; *Sturtevant v. Ford*, 4 Man. & G. 101; *Carruthers v. West*, 11 Ad. & E., N. S., 143; *Stien v. Yglesias*, 1 Crompt. M. & R. 565; Byles on Bills (Sharswood's ed.) 285; and remarks: "The earlier authorities were otherwise"—citing *Tenson v. Francis*, 1 Camp. 19; *Brown v. Davis*, 8 Term. Rep. 80; 7 Term. Rep. 429; Chitty on Bills (13 Am. ed.), 347; Story on Bills, section 192; and, as opposing the doctrine of the text, *Hoffman v. Foster*, 43 Pa. St. 137; *Bower v. Hastings*, 36 Pa. St. 285; *Chester v. Dorr*, 41 N. Y. 279 (overruling *Brown v. Mott*, 7 Johns. 361); *Battle v. Weems*, 44 Ala. 105.

And the same author, in section 786, in discussing the subject of "accommodation paper," says: "While it is the general rule that if the paper be overdue at the time of the transfer, that circumstance of itself is notice, and he can acquire no better title than his indorser, yet, if the indorser's title were ^{§14} unimpeachable, the fact that the paper was executed for accommodation, without consideration, and that the indorsee knew it, is no defense, even where the paper was overdue at the time of the indorsement, it being considered that parties to accommodation paper hold themselves out to the public, by their signatures, to be bound to every person who shall take the same for value, to the same extent as if paid to him personally. If the holder received the paper after maturity from an indorser, who took it *bona fide* before maturity, there is no question as to his right to recover; but if he takes it after maturity from the party for whose accommodation it was made, indorsed, or accepted, there is conflict

of decision on the subject": Citing *Chester v. Dorr*, 41 N. Y. 279, and *Coghlin v. May*, 17 Cal. 515.

The text-writers above referred to agree in their statement of the general rule, in respect to negotiable paper for value, in the following cardinal propositions:

1. That a negotiable note may be transferred at any time while it remains a good, subsisting, unpaid note, whether before or after maturity; and, in the latter case, even though it be protested for nonpayment, and bear upon its face the stamp of dishonor.

2. That payment of a dishonored note by an indorser does not extinguish its negotiability, though it discharges the liability of subsequent indorsers, whose liability will not be revived by his putting the note again in circulation.

3. That though a negotiable note may be transferred as well after as before it becomes due, the rights of the indorsee are very different in the two cases.

4. That in the case of a transfer of a note before it becomes due to a *bona fide* holder for value, he takes it free of all equities between the antecedent parties of which he has no notice; and that such holder often acquires a better right than that of the indorser under whom he claims.

§15 5. That in the case of a transfer of an overdue note the holder takes it as a dishonored note, subject to all the defenses and equities to which it was subject in the hands of his immediate indorser, whether he has any notice thereof or not; such holder takes nothing except the title and right of his immediate indorser.

The same authors substantially agree in their statement of the exception, as respects the accommodation paper, to the general rule above stated in regard to negotiable paper for value; but they do not agree so well as to the extent and application of the doctrine of said exception.

In 1 Daniel on Negotiable Instruments, section 786, above quoted, important limitations to the doctrine in respect to accommodation paper are recognized, which seem to be ignored in the broad and sweeping statement of the same doctrine made by Judge Moncure in *Davis v. Miller*, 14 Gratt. 5, 6.

In that case, after first stating the general rule as above, the learned judge says: "An exception exists in the case of an accommodation note, which is said in general to be governed by the same rules as negotiable paper for consideration."

This language would seem to indicate that, subject to exceptions not enumerated, the general rule applies as well to accommodation notes as to notes for value; but this statement is immediately followed by the following broad and apparently inconsistent statement: "So that a *bona fide* indorsee of such a note [that is, accommodation note], whether before or after maturity, and, though knowing it to be an accommodation note, may enforce it against the prior parties. In that case an indorsee of an overdue note acquires a right, though the indorser under whom he claims has none."

This unqualified statement of the doctrine would seem to go to the unreasonable extent of giving to the indorsee of an overdue note the right to recover against the antecedent ⁸¹⁶ parties, when his immediate indorser is the person for whose accommodation the note was made, and when such indorser had paid off and taken up the note at maturity. And it is this view of the doctrine, as stated by Judge Moncure, upon which counsel for the appellees rely to uphold the decree of the court below sustaining the demurrer and dismissing the bill. Such is not the law of this state, and has never been so held. In this connection it is proper to call attention to the fact that in *Davis v. Miller*, 14 Gratt. 5, 6, no question was involved touching accommodation paper in any way, so that Judge Moncure's statement of the doctrine in question can only be treated as a passing notice of the exception to the general rule.

It is not unfrequently the case that the indorsee or transferee of accommodation paper, as well as of paper for value, has the right to hold the prior parties liable to him; as, for instance, where his immediate indorser took the paper for value before maturity, and, after maturity, transferred it to the holder. Accommodation paper, as well as paper for value, continues to be negotiable until it is paid off or discharged. Hence, in 1 Daniel on Negotiable Instruments, section 786, it is said: "While it is the general rule that if the paper be overdue at the time of the transfer that circumstance of itself is notice, and he [the indorsee] can acquire no better title than his indorser; yet, if the indorser's title were unimpeachable, the fact that the paper was executed for accommodation, without consideration, and that the indorsee knew it, is no defense, even where the paper was overdue at the time of the indorsement," etc.

This statement materially limits the doctrine as stated by Judge Moncure in *Davis v. Miller*, 14 Gratt. 5, 6. The same author in the same section says: "If the holder received the paper [accommodation paper] after maturity from an indorser who took it *bona fide* before maturity, there is no question as to his right to recover; but if he takes it after maturity from the party for ⁸¹⁷ whose accommodation it was made, indorsed, or accepted, there is conflict of decision on the subject," etc.

Reference has already been made to the authorities favoring, and to those opposing, the doctrine, and it is safe to say, especially in view of the later English decisions on the subject, that the decided weight of authority is opposed to the doctrine. The doctrine gained a temporary footing in New York, but was overruled in *Chester v. Dorr*, 41 N. Y. 279; and the fact that the doctrine does not obtain in that great commercial state is of itself a potential argument against its soundness.

But independently of all that has been said, the doctrine itself, so far from upholding the integrity and ready circulation of commercial paper, strongly tends to suppress a large class of such paper and to ruinously cripple commercial transactions. Accommodation paper, without consideration, is a most important factor in the commercial world. Such paper crowds every avenue of commercial enterprise. Why, then, subject the makers, indorsers, or acceptors of such paper to this species of outlawry by denying to them the defenses guaranteed to the makers, indorsers, and acceptors of negotiable paper for value?

We know of no sufficient reason upon which to found any such doctrine, nor do we believe the ingenuity of man can suggest one. The reason, and the only reason, given in the books is, that it is "considered that parties to accommodation paper hold themselves out to the public, by their signatures, to be bound to every person who shall take the same for value to the same extent as if paid to him personally." This is no reason whatever for the distinction, as precisely the same reason is applicable to the parties to paper for value.

It will be found, on examination, that this exception as respects accommodation paper, to the general rule, rests almost exclusively upon the authority of the three English cases of *Charles v. Marsden*, 1 Taunt. 224, *Sturtevant v. Ford*, 4 Man. &

G. 101, and *Carruthers* ⁸¹⁸ v. *West*, 11 Ad. & E., N. S., 143; and that the doctrine is comparatively modern in that country, and was transmitted to us upon the authority of the same cases. It will also be found that the doctrine, as stated by Judge Moncure in *Davis v. Miller*, 14 Gratt. 5, 6, is not fairly deducible from the decisions in either *Sturtevant v. Ford* or *Caruthers v. West*, the two English cases, and the only cases, referred to by him. Let us, then, briefly review the three English cases, commencing with *Charles v. Marsden*, 1 Taunt. 224, decided in 1808. That was an action brought by the plaintiffs as indorsees of a bill of exchange drawn by Atkinson against the acceptor. The defendant pleaded that he had accepted the bill for the use and accommodation of Atkinson, and without any consideration whatsoever for the same, and that afterwards, and after the time when the bill became due and payable, Atkinson indorsed it to the plaintiffs, they well knowing at the time of such indorsement that it had been and was so accepted by the defendant for the use and accommodation of Atkinson, and that the defendant had not ever received any consideration whatsoever for the same. The plaintiffs replied (with a protestation of the insufficiency of the plea) that Atkinson indorsed the bill to them before the time when it became due, and not after, as the defendant had alleged, and that, they prayed, might be inquired of by the country. The defendant demurred, and assigned for cause that the replication concluded to the country, whereas, inasmuch as the plaintiffs had offered an issue only on one of the facts set forth in the plea, and not on all, they ought to have concluded their replication to the court with a verification. The case turned on the question as to the sufficiency of the plea, and it was held that "it is not of itself a defense to an action by the indorsee of a bill of exchange to plead that it was accepted for the accommodation of the drawer without consideration, and was indorsed over after it became due." ⁸¹⁹ In other words, the court held that the mere fact that the bill was accepted for accommodation and without consideration did not preclude the indorsee's right of recovery. Surely, there is nothing in this upon which to ground the doctrine we have been combatting.

In *Sturtevant v. Ford*, 4 Man. & G. 101, decided in 1842, it was held that "a plea by the acceptor of a bill, to an action by the indorsee, that the bill was accepted before it became

due, at the request and for the accommodation of J. S., and without any value or consideration for the acceptance, or for the payment, and that the bill was indorsed to the plaintiff after it became due, is bad." It is plain that this case simply followed the preceding case of *Charles v. Marsden*, 1 Taunt. 224. In this case Tindal, C. J., said: "Upon these pleadings the plaintiff must be taken to be a holder for value, without notice of any defect in the title of his indorser. Upon the authority of the cases, without saying what would be my opinion if the question were *res integra*, I think the plaintiff is entitled to judgment." And Creswell, J., said: "I am of the same opinion. Had this been *res integra*, I am not prepared to say that I should have come to the same conclusion. I should have thought it a case of doubt. By the law merchant an indorsement may give to the indorsee a better title than the indorser had. It is said that the indorsee of a bill which is overdue takes it subject to all the equities. Perhaps a better expression would be that he takes the bill subject to all its equities. That brings it to the question whether this is an equity which attaches to the bill. In *Charles v. Marsden*, 1 Taunt. 224, the court said that there was no reason why a bill should not be negotiated after it became due, unless there was an agreement for the purpose of restraining it." These remarks of the two judges referred to show: 1. That, upon the principle *stare decisis*, they were enforcing a doubtful doctrine; 2. That an indorsee may take a better ⁸³⁰ title than his indorser had; and 3. A bill or note may be negotiated as well after as before maturity, provided there is no agreement, express or implied, that it shall not be negotiated after it becomes due. In other words, the remarks of Tindal, C. J., and Creswell, J., apply, in general, for reasons already stated, alike to paper for value and to paper for accommodation, without consideration; and, when rightly interpreted, simply mean that negotiable paper may be transferred so long as it remains unpaid, whether before or after maturity. But neither of these judges, nor either of the other judges who delivered opinions in the case, say anything to warrant the doctrine of the alleged exception to the general rule, which so harshly discriminates against the makers, indorsers, and acceptors of accommodation paper.

And in the case of *Carruthers v. West*, 11 Ad. & E., N. S., 143, the action was *assumpsit* on a bill of exchange drawn by John

Sewell, directed to defendant, for thirty pounds, value received, payable to Sewell's order, two months after date (which period had elapsed), and then accepted by the defendant, and then indorsed by Sewell to George Barclay, who then indorsed to plaintiff; averment of notice to defendant, and promise by him to plaintiff to pay according to the tenor and effect of the bill, acceptance, and indorsements. Plea—that defendant accepted the bill, “at the request and for the accommodation of” J. Sewell and George Barclay, “and without any value or consideration whatever; and there never was any value or consideration for the said acceptance” by defendant; and “defendant so accepted the same upon the terms and condition that the same might be indorsed and negotiated for the accommodation and use of J. Sewell and G. Barclay only before the same became due and payable, and not afterwards”; that the bill was indorsed to plaintiff, “without the consent, privity, or default of” the defendant, after the same became due and payable, and not before that time; and that plaintiff ^{§21} “did not become the holder” of the bill, “or entitled to the same, or to any interest or property therein, until after it so became due and payable.” *Held*, a bad plea, on motion for judgment *non obstante veredicto*.

It is obvious that these cases do not go to the extent of the exception to the general rule, as stated by Judge Moncure in *Davis v. Miller*, 14 Gratt. 5, 6. On the contrary, they decide, and only decide, that the mere fact that negotiable paper is made, drawn, indorsed, or accepted for accommodation, and without consideration, does not constitute a valid defense to an action by the holder on such paper; or that, as was said by Lord Chief Justice Mansfield, in *Charles v. Marsden*, 1 Taunt. 224, “it is not necessarily to be inferred, because it was an accommodation bill, that there was an agreement not to negotiate it after it became due,” etc.; thus conceding that where there is such an agreement it will constitute a valid defense. And the same principle is recognized in the cases of *Sturtevant v. Ford*, 4 Man. & G. 101, and *Carruthers v. West*, 11 Ad. & E., N. S., 148. It is obvious that these English cases do not sustain the argument of counsel, based on the exception to the general rule, as stated by Judge Moncure, that the case in hand falls within the alleged exception from the fact that the notes in question, being accommodation notes, the parties thereto are bound to the appellee, Charles T.

Watkins, the transferee, after maturity, of Joseph F. Cottrell, the person for whose accommodation the notes were made, and when he had paid them at maturity—and this upon the bare supposition that the parties to the notes in question hold themselves out to the public by their signatures, to be bound to every person who shall take the same for value, to the same extent as if paid to him personally, even though the notes were overdue when taken by the appellee, Charles T. Watkins, and with knowledge that they were accommodation notes, and had been paid, at maturity, by Joseph F. Cottrell, for whose accommodation they were made, indorsed, and ^{and} passed to said Clover Hill Railroad Company in discharge of the debt due it by said Joseph F. Cottrell. Such certainly is the effect of the argument, especially in the light of the case stated in the bill, the facts therein stated being, on demurrer, taken and admitted to be true. The contention is opposed to both reason and authority, and cannot be upheld.

In 1 Daniel on Negotiable Instruments, section 726, it is said, *inter alia*: "If the accommodation bill or note had been paid at maturity, then the position of the purchaser would be altered, for a defense is then established which goes to the merits of the case."

After, in previous sections, discussing the equities which may or may not attach to a bill or note in the hands of a transferee, after maturity, in section 180, Story on Promissory Notes, it is said: "But there is a period when promissory notes cease altogether to be negotiable, in whosoever hands they may then be, so far as respects the antecedent parties thereto, who would be discharged therefrom by the payment thereof."

Let us now look to two English cases, decided long after *Sturtevant v. Ford*, 4 Man. & G. 101, and *Carruthers v. West*, 11 Ad. & E., N. S., 143, and which stands opposed to the doctrine of those cases, and support the doctrine of the text-writers last above quoted.

In *Lasarus v. Cowie*, 3 Ad. & E., N. S., 458, 43 Eng. Com. L. 819, decided by the court of Queen's Bench in 1842, to a declaration on a bill of exchange, by indorser against acceptor, the plea was that the acceptance was for the accommodation of the drawer, and without any consideration; that before the indorsement of the plaintiff the drawer negotiated the bill for his own use, and paid it when due, whereupon it was re-

delivered to him; and that, after it was due, the drawer indorsed it to plaintiff, without it being restamped, or payment of any duty in respect of the reissuing; and that plaintiff, before and at the time of the indorsement to him, had notice of the premises. *Held*, on special demurrer: 1. ⁸²³ That payment by the accommodation drawer being equivalent to payment by an accommodation acceptor, the bill, when reissued, was in law a new bill, and required a fresh stamp. 2. That, inasmuch as stat. 55 G. 3d, c. 184, sec. 19, expressly prohibits the reissuing a bill of exchange which has been paid, and inflicts a penalty on any person doing it, the defense was available by plea.

In *Parr v. Jewell*, 32 Eng. L. & Eq. 394, decided by the court of Common Pleas as late as 1855, it was expressly decided that "it is a good defense to an action by an indorsee against the acceptor of a bill of exchange, that it was accepted for the accommodation of the drawer, without consideration, and that it was indorsed over by the drawer after it had been paid by him at its maturity."

In the light of these authorities, and in the light of reason and justice, there is no foundation for the argument of counsel in behalf of the appellee, Watkins, nor for the exception to the general rule upon which that argument is based.

The appellee, Watkins, knows how he came by the notes in question—whether he got them in a fair transaction or not; but, instead of answering the bill and exposing his claim to the light of day and all the surrounding circumstances, he seeks to screen his conduct, in this most suspicious transaction, by the technical defense of a demurrer.

It has been well said: "Courts of equity are apt, and with reason, to look with a suspicious eye upon defendants who, by availing themselves of every cause of demurrer or plea, show an unwillingness fairly to meet the plaintiff's case. It is seldom, therefore, advisable to have recourse to these modes of defense, unless to prevent the expense of an examination of witnesses, or to avoid a discovery which might be detrimental to the defendant's just and rightful interests." Under the peculiar circumstances of this case, which strongly commend themselves to the favorable consideration of a court of ⁸²⁴ equity, the appellee, Watkins, if he had a just and rightful claim to the notes in question, could hazard nothing by answering the bill and asserting that claim in the broad light

of day. If he has no such claim, he should not be permitted to reap good results from an unconscionable and fraudulent transaction. The Cottrell brothers and the appellee, Watkins, seem to have lived near each other—practically in the same neighborhood—and it is but fair to infer that said appellee had full knowledge of the fact that the notes were made for the accommodation of Joseph F. Cottrell, and had been paid by him at maturity, and that the debt was thereby extinguished, and the purpose accomplished for which said trust deed was executed. If the appellee, Watkins, instead of procuring a sale under said trust deed, by falsely and fraudulently representing to the trustees that he was the legal holder of the notes, and that they remained unpaid, had brought suit on the notes, it is unquestionably true that the facts stated in the bill would have constituted a good defense to such action. We are, therefore, clearly of opinion that the court, by its decree of December 1, 1891, erred in sustaining the demurrer of the defendants to complainants' bill, and that said decree must be reversed and annulled.

We are also of opinion that the decree rendered on a subsequent day of said term—to wit, on the eighteenth day of December, 1891—is also erroneous, and must likewise be reversed.

As already stated, the court below, after sustaining the demurrer to the original bill, as amended, not upon the grounds suggested and urged by counsel, but upon the very singular ground, considering the circumstances of the case, of laches, and having thereby taken the plaintiff, John W. Cottrell, completely by surprise, he, on said subsequent day of the same term, moved the court to set aside said decree of a former day of said term, and to allow him to file his second amended bill, then tendered to the court. In the amended bill ²³⁵ so tendered and refused by the court, and which, by the order of refusal, was made a part of the record, the plaintiff, John W. Cottrell, in the most satisfactory manner explains everything savoring of laches and acquiescence, and why he did not resist the sale made by said trustees. Under the peculiar circumstances, it was manifestly the duty of the judge of the court below to grant the motion of the plaintiff to set aside said decree of December 1, 1891, and to allow him to amend his bill as aforesaid. But the court refused the motion, and, in so doing, plainly erred, all the circumstances being considered.

For the reasons aforesaid, we are of opinion to revise and annul both of the decrees appealed from, to wit, the said decree of December 1, 1891, and the said order of December 18, 1891, and to remand the cause to said circuit court, with instructions to allow the appellant, John W. Cottrell, to further amend his bill, and for further proceedings in accordance with the views expressed in this opinion.

ACCOMMODATION PAPER.—For a monographic note on this topic see 31 Am. St. Rep. 745 to 757. A *bona fide* holder of a bill of exchange cannot be prejudiced by the fact that such bill was accepted for accommodation of the drawers on their representation that the proceeds would be applied to a specific purpose: *Garden City Nat. Bank v. Fidler*, 155 Pa. St. 210; 35 Am. St. Rep. 374.

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ADVERSE POSSESSION.

1. **ADVERSE POSSESSION BY MARRIED WOMAN.**—The presumption that the possession of a husband and wife in joint occupancy of land as a home is the possession of the husband may be rebutted by showing that she took possession in her own right under a conveyance from her father, and continued it for twenty-one years, or until the title vested in her by adverse possession. The jury must determine as to the sufficiency of such evidence to overcome the presumption arising from the joint occupancy by husband and wife. *Collins v. Lynch*, 723.
2. **ADVERSE POSSESSION BY MARRIED WOMAN—ACTS AND DECLARATIONS BY HUSBAND AS AFFECTING.**—If a married woman takes possession of land in her own right under a conveyance from her father, and continues to hold it for twenty-one years, or until title is vested in her by adverse possession, her title cannot be affected by the acts and declarations of her husband, who occupies the land jointly with her. *Collins v. Lynch*, 723.

3. **ADVERSE POSSESSION BY MARRIED WOMAN—EFFECT OF RECOVERY IN EJECTMENT AGAINST HUSBAND.**—When a married woman enters into possession of land in her own right under a conveyance from her father, who is a mere trespasser, and continues uninterruptedly in possession, claiming the land as her own for twenty-one years, prior to a recovery in ejectment against her husband, who is in joint occupancy with herself, her title is complete, and is not affected by such recovery. *Collins v. Lynch*, 723.
4. **ADVERSE POSSESSION BY MORTGAGEE—STATUTE OF LIMITATIONS BEGINS TO RUN, WHEN.**—Where the grantee under a deed absolute in form, but intended as a mortgage enters into possession of the land conveyed, and holds it under circumstances which show that his possession is adverse to his grantor, the statute of limitations, in the absence of any agreement as to when the indebtedness secured by the deed is to be paid, begins to run immediately from the date of the delivery of the deed. *Borden v. Clow*, 511.
5. **ADVERSE POSSESSION BY MORTGAGEE—RUNNING OF STATUTE NOT STOPPED BY PAYMENT OF TAXES BY MORTGAGOR, WHEN.**—After a mortgage debt is once due, the payment of the taxes by the mortgagor will not stop the running of the statute of limitations in favor of a mortgagee holding possession of the land adversely to the mortgagor. *Borden v. Clow*, 511.

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AGENCY.

1. **POWER OF GENERAL AGENT TO WARRANT.**—A general agent employed to carry on a business with power to sell also has power to warrant, if it is usual to give a warranty when making a sale in such business. *Edwards v. Dillon*, 199.
2. **POWER OF AGENT TO WARRANT.**—A general agent employed to carry on the business of horse-dealing for his employer has implied authority to warrant soundness when selling a horse. *Edwards v. Dillon*, 199.
3. **CORPORATIONS—PERSONAL LIABILITY OF AGENT.**—If an agent, either of a corporation or an individual, enters into a contract which he has no authority to make, he binds himself personally, according to the terms of the contract. *Frankland v. Johnson*, 234.
4. **CORPORATIONS—PERSONAL LIABILITY OF AGENT—BURDEN OF PROOF.** If a person undertakes to contract as agent for an individual or a corporation, and contracts in a manner not legally binding upon his principal, he is personally liable, and when sued upon such contract, can exonerate himself from personal responsibility only by showing his authority to bind those for whom he undertook to act. *Frankland v. Johnson*, 234.
5. **EVIDENCE, TELEPHONE, CONVERSATIONS BY AID OF OPERATOR.**—An operator of a telephone called upon to conduct a conversation between two parties becomes thereby the agent of both, and what he repeats to one as being said by the other is admissible in evidence against the latter, and is not hearsay. It is competent, because it is the declaration of an agent made during the progress of a transaction in which he represents his principal. *Oskamp v. Gadsden*, 423.

C. EVIDENCE—DECLARATION OF AGENT.—An agent, after a transaction has been completed, cannot bind his principal by any admission or declaration he may make concerning its character. *Borland v. Nevada Bank*, 32.

See CARRIERS, 10; CORPORATIONS, 1; INSURANCE, 1-5; INTOXICATING LIQUORS, 3; MISTAKE, 2; PARTNERSHIP, 1; VENDOR AND PURCHASER, 4.

ALTERATION OF INSTRUMENTS.

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APPEAL.

1. **RES JUDICATA.**—While the party against whom a judgment has been entered retains the right to appeal therefrom, it cannot be admitted in evidence against him as a bar, under a statute declaring that an action shall be deemed pending from the time of commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied. *Nastager v. Gregg*, 23.
2. **EXCEPTION, SUFFICIENCY OF.**—An exception which merely alleges that there was error "in granting a nonsuit and dismissing the complaint," is too general to be considered. *Whitney Mfg. Co. v. Richmond etc. R. R. Co.*, 767.
3. **PRESERVING OBJECTION TO COMPETENCY OF EVIDENCE.**—When a party fails to make any objection on the trial to the introduction in evidence of a judgment-roll, or any part of it, or to make any motion to exclude any part of it which is not competent, or to ask for any instruction limiting its effect, he cannot base an assignment of error on the admission of such evidence. *Grommes v. St. Paul Trust Co.*, 248.
4. **RES JUDICATA—EFFECT OF APPEAL.**—The only effect of an appeal from a judgment, supplemented with the filing of a proper *supersedeas* bond, is to stay execution of the judgment, but as long as the case remains unreversed, its conclusiveness as *res judicata* as between the parties is not affected by the appeal. *Willard v. Ostrander*, 294.
5. **JUDGMENTS—APPEAL FROM—EFFECT OF AND PRACTICE ON.**—The only effect of an appeal supplemented with a *supersedeas* bond is to stay the execution of the judgment appealed from, but trial courts in other subsequent actions have the power to prevent injustice being done in the use of an alleged erroneous judgment as evidence or as an estoppel to continue the hearing of such actions from time to time, until proceedings pending to reverse such judgment are disposed of. The supreme court also has the inherent power for the protection of its own jurisdiction, and for the enforcement of its orders and judgments, to prohibit and restrain upon proper terms, the parties in any proceeding pending in that court, from using a judgment brought there for review, as evidence or as an estoppel in any other case pending in that or any other court, so long as the proceeding to review the alleged erroneous judgment remains undetermined. *Willard v. Ostrander*, 294.

6. **WITNESSES—INCOMPETENCY, WAIVER OF.**—An objection to a witness for personal disqualification cannot be made for the first time in the appellate court. *Clough v. Holden*, 393.
 7. **INADMISSIBLE EVIDENCE NOT EXCEPTED TO** at the time it was offered cannot be complained of on appeal, in the absence of a motion to strike it out after it was so admitted by the trial court. *Simon v. State*, 802.
 8. **AGENCY—QUESTION OF, WHEN NOT OPEN TO REVIEW ON APPEAL.**—When the question of fact as to whether or not a note signed by an officer of a corporation is his personal contract, or that of his principal, is determined by the trial court, that question is not open to consideration on appeal. *Frankland v. Johnson*, 234.
 9. **CONVERSION—WANT OF EVIDENCE TO SUPPORT INSTRUCTION.**—If in an action charging the defendant with the unlawful taking and converting of a flock of sheep, he justifies under a chattel mortgage given by plaintiff to him which mortgage the plaintiff charges the defendant with having materially altered after its execution, it is error for the court to submit as a material question the issue as to the alteration of such mortgage when no evidence tending to show such alteration by the defendant or his agent has been introduced. *Willard v. Ostrander*, 294.
 10. **JURY TRIAL—EXTRANEOUS MATTER WRITTEN ON INSTRUCTION.**—The "guilty," written through inadvertence by the trial judge on the margin of an instruction given to the jury in a criminal case, and permitted to remain in their hands in that form during their deliberations, is presumed, on appeal, to have been read by and to have influenced them to the prejudice of the accused, and entitles him to a reversal unless it is shown beyond a reasonable doubt that no injury resulted therefrom. *Hawkins v. State*, 92.
 11. **REFUSAL TO INSTRUCT AS TO TESTIMONY, WHEN NOT ERROR.**—It is not reversible error to refuse an instruction as to the legal effect of testimony upon which no claim is founded. *Hann v. National Union*, 365.
 12. **EVIDENCE—HEARSAY TESTIMONY, WHAT IS.**—In an action to recover damages for personal injuries, evidence of what the plaintiff said in regard to the hurt some time after the accident is not admissible to prove such hurt, but the admission of such evidence is not reversible error if the plaintiff has previously testified to the same injury, and his statements have not been contradicted. *La Duke v. Township of Exeter*, 357.
 13. **IMPROPER ARGUMENT—REVERSIBLE ERROR.**—Remarks by a prosecuting attorney in his closing argument in a criminal case to the effect that one of the jurors had foresworn himself in order to hang the jury, whether true or false, are prejudicial to the rights of the accused, and are grounds for a reversal of a verdict of conviction. *Weatherford v. State*, 828.
 14. **CHANGE OF VENUE.**—An order denying an application for a change of venue cannot be considered on appeal unless the facts upon which the order was based are presented in a bill of exceptions. This rule is not altered by attaching to the application for a change of venue a newspaper account of the action of a mob which sought to take the accused from custody for the purpose of hanging him. *Miller v. State*, 836.
- See EVIDENCE, 9; JURISDICTION, 2; NEW TRIAL, PROHIBITION, 2; TRIAL, 2.

APPROPRIATIONS.

See LEGISLATURE, 2.

ARREST.

SELF-DEFENSE—ILLEGAL ARREST—RIGHT TO RESIST.—A person is not required to submit to illegal arrest, but may demand the warrant or proper authority, and in its absence repel force by force, provided, the force does not exceed prevention and defense. The right to repel force by force continues until the person attempting the illegal arrest presses forward with such violence, that the person defending is obliged to choose between three things—to retreat, to surrender, or the death of his adversary. If the force used is disproportionate to the injury about to be inflicted, self-defense is eliminated, and if it is attributed to any other cause than resistance to the illegal arrest, such arrest cannot be a mitigating circumstance. *Miller v. State*, 836.

See HOMICIDE, 7-11; IMPRISONMENT, 1; OFFICERS, 3, 4.

ASSAULT.

1. **ASSAULT WITH INTENT TO MURDER—EVIDENCE OF MALICE.**—On prosecutions for assault with intent to murder, antecedent menaces, quarrels, grudges, or a previous attempt to kill the prosecuting witness, are admissible to throw light on the acts of the accused and to prove malice or motive. *Sullivan v. State*, 826.

2. **SELF-DEFENSE—PROVOKING QUARREL.**—A party charged with assault with intent to kill, who brought on and began the difficulty, cannot justify his attempt to kill on the ground of self-defense, and although he thus began the difficulty with no intent to kill or to do bodily injury, yet, if afterwards, he found it necessary to kill his opponent to save his own life, he cannot justify his act by claiming that it was done in self-defense. *Sullivan v. State*, 826.

3. **ASSAULT WITH INTENT TO MURDER—SELF-DEFENSE—INSTRUCTIONS.**—In a prosecution for assault with intent to murder, an instruction requested by the accused to the effect, that upon the question of self-defense the facts must be viewed from the standpoint of the accused, and if, when he shot, he had reason to believe that the prosecuting witness was about to shoot him, the jury must acquit, is properly qualified, by adding that if the accused brought on the difficulty he cannot claim self-defense, when such qualification is justified by the evidence. *Sullivan v. State*, 826.

See RAPE, 6.

ASSESSMENTS.

See MUNICIPAL CORPORATIONS, 4, 13-19; STATUTES, 20.

ASSIGNMENT.

See BILLS OF REVIEW; JUDGMENTS, 10; LANDLORD AND TENANT, 6-9.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. **CONFLICT OF LAWS.**—A VOLUNTARY ASSIGNMENT BY A DEBTOR of all his property for the benefit of his creditors valid by the law of his domicile will prevail against the lien of an attachment subsequently issued in another state or country in favor of a creditor there, whether citizen or nonresident, upon a debt of the original assignor embraced in the assignment, provided the recognition of the title under the assignment does

- not contravene the statutory law of the state, or is not repugnant to its public policy. *Barth v. Backus*, 545.
2. **CONFLICT OF LAWS.—TITLE TO PERSONALTY ACQUIRED IN INVITUM UNDER FOREIGN INSOLVENCY OR BANKRUPT LAWS** will not be recognized in another jurisdiction where it comes into conflict with the rights of creditors pursuing their remedies there against the property of the debtor, although the proceedings were instituted subsequently to, and with notice of, the transfer in insolvency or bankruptcy. *Barth v. Backus*, 545.
 3. **CONFLICT OF LAWS.—WHEN NONRESIDENT CREDITORS SUING IN THIS STATE AND HERE ATTACHING PROPERTY** are brought into conflict with an assignment made by their debtor in another state for the benefit of his creditors, they are accorded the same rights as resident creditors, and if the latter can successfully oppose such assignment, so may the former. *Barth v. Backus*, 545.
 4. **AN INSOLVENT CORPORATION CAN MAKE A GENERAL ASSIGNMENT** to an assignee in trust for the benefit of its creditors. *Vanderpoel v. Gorman*, 601.
 5. **A FOREIGN CORPORATION MAY, IN NEW YORK, MAKE AN ASSIGNMENT FOR THE BENEFIT** of its creditors, there being no law of that state nor of the state of the domicile of the corporation forbidding the assignment. The provisions of the statute forbidding a corporation from making an assignment in contemplation of insolvency, and declaring such assignment to be void, applies to domestic corporations only. *Vanderpoel v. Gorman*, 601.
 6. **PREFERENCES—VOID CHATTEL MORTGAGES.**—When an insolvent debtor executes chattel mortgages upon some of his property to secure certain preferred creditors, and at the same time, and as a part of substantially the same transaction, executes an assignment of all of his property for the benefit of all of his creditors, subject however to such chattel mortgages, the latter are void, although the debtor may have previously promised without consideration that in case of trouble he would secure the preferred creditors. The deed of assignment is valid, and vests all of the property in the assignee. *Jones v. Kellogg*, 278.
 7. **DAMAGES IN TROVER FOR CONVERSION OF ASSIGNED PROPERTY.**—When an insolvent debtor executes a deed of assignment of all his property for the benefit of all his creditors, subject to certain chattel mortgages, preferring certain creditors, executed at the same time and as part of the same transaction, and the assignee after taking possession of all the property, delivers the possession of the part mortgaged to the mortgagees, under the belief by all of the parties that the mortgagees have a prior right thereto, the latter, while in quiet and exclusive possession, can hold the property against everyone except the assignee or those claiming under him; and if creditors of the original owner cause the property to be taken from the possession of mortgagees as the property of such owner under their writ of attachment, the attaching officer is a mere trespasser and as such liable to the mortgagees for damages amounting to the full value of the property in an action in the nature of trover for its conversion. *Jones v. Kellogg*, 278.

See **INSOLVENCY; TRUSTS**, 2-4.

ASSIGNMENT OF ERROR.

See **APPEAL**, 3.

ASSUMPTION OF RISKS.

See MASTER AND SERVANT, 2-4.

ATTACHMENT.

1. **EXEMPTIONS—WAGES.**—COMMISSIONS DUE AN EMPLOYEE for personal services are not liable to attachment. *Hamberger v. Marcus*, 719.
2. **EXEMPTIONS.**—COMMISSIONS EARNED by factors or brokers are not exempt from attachment as wages of laborers or salaries of persons in public or private employment. *Hamberger v. Marcus*, 719.
3. **EXEMPTIONS—COMMISSIONS AS WAGES—SALESMAN NOT BROKER OR FACTOR.**—A traveling salesman who exhibits samples of and takes orders from purchasers for his employer's goods is not a broker or factor, although he may be compensated for his services by commissions on the sales so effected by him. Such commissions are in effect wages or salary, and as such are exempt from attachment in the hands of the employer. *Hamberger v. Marcus*, 719.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 3; CHATTEL MORTGAGES, 2; JUDGMENTS, 4.

ATTAINDER.

BILLS OF ATTAINDER were legislative judgments of conviction; exercises of judicial power by parliament without a hearing, and in disregard of the first principles of natural justice. *People v. Hayes*, 572.

BAILMENTS.

A CONTRACT WHEREBY ONE PARTY IS TO FURNISH CERTAIN MATERIALS, to which the other is to add other materials, and also to perform labor so as to manufacture a specified number of pruning-shears, is a contract of bailment, and not of purchase and sale, and the title to the completed shears is at all times in the person for whom they were manufactured. *Mack v. Snell*, 534.

BANKRUPTCY.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

BANKS.

If a cashier draws checks in favor of customers of the bank, but without their knowledge, and without intending them to have any interest therein, and then forges their indorsements and delivers the checks to third persons to be collected for his benefit, the bank is answerable for the act of its cashier, and liable for the checks thus drawn by him. *Phillips v. Mercantile Nat. Bank*, 596.

See CHECKS; PAYMENTS, 3; TRUSTS, 2-4.

BASTARDY.

See IMPRISONMENT.

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See MUNICIPAL CORPORATIONS, 11, 12.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

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See ATTAINDER.

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See APPEAL, 14.

BILLS OF REVIEW.

A BILL OF REVIEW DOES NOT LIE IN FAVOR OF AN ASSIGNER: *Gibson v. Green*, 868.

BILLS OF SALE.

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BLASTING.

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BOARDS OF HEALTH.

BOARDS OF HEALTH ARE NOT REQUIRED TO GIVE NOTICE OF HEARING to any person before they can exercise their jurisdiction for the public welfare, unless the statute under which they are authorized to act expressly requires such notice or hearing. *People v. Board of Health*, 522.

See CERTIORARI; NUISANCES, 3-5.

BOUNDARIES.

See EVIDENCE, 14.

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See DEEDS, 4.

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CARRIERS.

1. **DELIVERY OF GOODS WHEN COMPLETE.**—The court is justified in pronouncing as a matter of law that the delivery of goods by a carrier is complete, where it appears from the undisputed evidence that they were transported in good condition to the place of delivery, duly receipted for, and fully taken under the control of the consignee, and there is no testimony offered to show that the carrier interfered with the property in any manner after it was thus received. *Whitney Mfg. Co. v. Richmond etc. R. R. Co.*, 767.
2. **DELIVERY, COMPLETENESS OF, WHEN A QUESTION FOR THE COURT.**—Whether the delivery of goods is completed is a mixed question of law and fact, but may be passed upon by the court, when there is no conflict of testimony. *Whitney Mfg. Co. v. Richmond etc. R. R. Co.*, 767.
3. **DELIVERY AS TERMINATING LIABILITY—DUTY TO STORE.**—When a consignee is in default in not receiving freight after its arrival at its destination, and after reasonable time and opportunity has been afforded in which to take it, the carrier cannot abandon it, but is required to exercise ordinary and reasonable care for its preservation as a warehouseman, but in the exercise of such care it may leave it in its cars, store it in its own warehouse, assuming the liability of bailee or warehouseman; or it may, with the exercise of a like degree of care in selecting a responsible and safe depository, store the goods in an elevator or warehouse, at the expense and risk of the owner, and thereby discharge itself from further liability. *Gregg v. Illinois Cent. R. R. Co.*, 238.
4. **DELIVERY TO TERMINATE LIABILITY—LIABILITY FOR LOSS IN WAREHOUSE.**—If a consignee is in default in not receiving freight, after reasonable time and opportunity in which to do so, the carrier may then store the goods in a safe warehouse, and is not thereafter liable for an injury by unprecedented flood, which could not have been anticipated or guarded against. *Gregg v. Illinois Cent. R. R. Co.*, 238.
5. **CARRIERS ARE NOT LIABLE AS WAREHOUSEMEN** when the property carried has once been placed in the charge of the consignee. *Whitney Mfg. Co. v. Richmond etc. R. R. Co.*, 767.
6. **A CARRIER HAS A LIEN FOR FREIGHT** charges upon the goods transported while it retains dominion and control of them, but when it delivers possession the lien is gone. *Gregg v. Illinois Cent. R. R. Co.*, 238.
7. **PRESERVATION OF LIEN FOR FREIGHT CHARGES WHILE GOODS ARE IN WAREHOUSE.**—A carrier, upon the default of the consignee to receive goods shipped to him after reasonable time and opportunity to so do, may store the goods in a safe warehouse in its own name, and thus preserve its lien for freight charges without subjecting itself to further liability as a warehouseman, and the warehouseman with whom the goods are stored will then hold them for the benefit of both the carrier and the consignor. *Gregg v. Illinois Cent. R. R. Co.*, 238.
8. **CARRIERS OF LIVESTOCK MAY CONTRACT WITH SHIPPERS THAT, AS A CONDITION PRECEDENT** to their right to recover damages for loss or injury to such stock, they will give notice in writing of their claim, to some officer of the company, or its nearest station agent, before such stock shall be removed from the place of destination, or from the place of delivery of the same, and before such stock is mingled with other stock. *Selby v. Wilmington etc. Ry. Co.*, 635.

9. CARRIER OF LIVESTOCK IS NOT REQUIRED TO HAVE VEHICLES STRONG ENOUGH to withstand the struggles of unruly and vicious stock. It is sufficient for the carrier to furnish cars suitable for the safe conveyance of ordinary animals of the class contracted to be conveyed. *Selby v. Wilmington etc. Ry. Co.*, 635.
10. SEVERAL COMMON CARRIERS FORMING A CONNECTING LINE for the transportation of property beyond the limits of their respective lines are agents of one another to accomplish the carriage and deliver the goods. *Missouri Pac. Ry. Co. v. Twiss*, 437.
11. IF ONE OF SEVERAL CONNECTING CARRIERS IS GUILTY OF NEGLIGENCE whereby property is injured, and the owner recovers for such injury of the carrier receiving the goods from him, the latter is entitled to be compensated by the negligent carrier for the recovery thus suffered through his fault. *Missouri Pac. Ry. Co. v. Twiss*, 437.
12. COUPON TICKETS OVER THEIR OWN AND CONNECTING LINES are entire contracts as to each line, but severable as between the different lines. *Nichols v. Southern Pac. R. R. Co.*, 664.

See RAILROADS, 1-19; SALES, 3, 4.

CASHIERS.

See BANKS.

CAUSA MORTIS.

See GIFTS, 5.

CERTIORARI.

THE ACTION OF A BOARD OF HEALTH of a municipality taken without giving any person a hearing, and declaring that a nuisance exists, cannot be reviewed by *certiorari*, because the action of such board is not final and conclusive, and may be made without a hearing, and upon its own inspection and knowledge. *People v. Board of Health*, 522.

CHANGE OF VENUE.

See TRIAL, 3.

CHARACTER.

See HOMICIDE, 1.

CHARTERS.

See STATUTES, 13.

CHATTEL MORTGAGES.

1. CHATTEL MORTGAGE ON SHEEP INCLUDES THEIR WOOL as between the parties, but after such wool is clipped and sold to a purchaser for value without notice he gets a good title free from the lien of the mortgage. *Willard v. Ostrander*, 294.
2. POSSESSION AND SALE OF GOODS BY MORTGAGOR—RIGHTS OF CREDITORS.—A mortgage of a stock of goods under which the mortgagor is permitted, by agreement, in or out of the mortgage, but executed at the same time, to sell the goods at discretion, or in the usual course of trade without any agreement to account for the proceeds, is fraudulent and void as to the existing creditors of the mortgagor without

regard to the intent of the parties to the mortgage. Such creditors may maintain an attachment proceeding against the mortgagor on the ground that they have reason to believe that he will fraudulently part with his property before judgment can be recovered against him. *Eckman v. Munnerlyn*, 109.

3. MATERIAL ALTERATION—PRESUMPTION.—The insertion of the word "wool" in a chattel mortgage of sheep subsequently to its execution is a material alteration, but it will not be presumed that the mortgagee made such alteration or directed his agent having the possession of the mortgage to so alter it. *Willard v. Ostrander*, 291.

See APPEAL, 9; ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 6, 7; WITNESSES, 4.

CHECKS.

BANKS AND BANKING.—A check drawn in the name of a real person who has no knowledge, and is not intended to have any knowledge, thereof, or any interest therein, is equivalent, in legal effect, to a check drawn in favor of a fictitious person. *Phillips v. Mercantile Nat. Bank*, 596.

See BANKS; PAYMENT.

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CONSTITUTIONAL LAW.

See CONSTITUTIONS; STATUTES; TAXES, 2, 3.

CONSTITUTIONS.

1. **CONSTRUCTION OF.**—If the language of a constitution is plain and free from ambiguity, the court is not permitted to speculate further as to what the real intentions of the framers of such constitution may have been. *State v. Clark*, 517.
2. **CONSTITUTIONS, CONSTRUCTION OF EJUSDEM GENERIS.**—A section in a constitution requiring the legislature to provide for the election of certain state and city officers "and other necessary officers" is not applicable to officers belonging to classes other than those previously enumerated. *State v. Clark*, 517.
3. **CONSTITUTION, CONSTRUCTION OF, BY SUPREME COURT OF STATE, BINDING UPON COURTS OF OTHER STATES.**—If the supreme court of a state has ruled upon the effect of a provision in the constitution of that state, such ruling will be adopted by the courts of sister states whenever the meaning of the provision comes in question. *Fowler v. Lamson*, 163.
4. **LIBERTY, MEANING OF.**—The fundamental principle upon which constitutional liberty is based is equality under the law of the land, and there can be no such liberty that is not regulated by such laws as will preserve the right of each citizen to pursue his own advancement and happiness, in his own way, subject only to the restraints necessary to secure the same rights to all others. *Braceville Coal Co. v. People*, 206.
5. **CONSTITUTIONAL LIBERTY** means not only freedom of the citizen from servitude and restraint, but includes the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare. *Braceville Coal Co. v. People*, 206.
6. **CONSTITUTIONAL LAW.—RIGHT TO CONTRACT** is both a liberty and a property right. If any person is denied the right to contract and acquire property in the manner which he has hitherto enjoyed under the law, and which others are still allowed by the law to enjoy, he is deprived of both the constitutional right of liberty and property, to the extent that he is thus denied the right to contract. *Braceville Coal Co. v. People*, 206.
7. **RIGHT OF PROPERTY** preserved by all constitutions is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful pursuit. The property which each citizen has in his own labor is a common heritage, and as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guarantee. *Braceville Coal Co. v. People*, 206.

3. "DUE PROCESS OF LAW," or, "law of the land," means general public law, binding upon all members of the community, under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals. *Braceville Coal Co. v. People*, 206.
See CONTEMPT, 1; CORPORATIONS, 7, 11, 14; IMPRISONMENT, 2; LEGISLATURE 1-4; NOTARIES PUBLIC; WITNESSES, 1.

CONTEMPT.

1. **CONSTITUTIONAL LAW.—COURTS HAVE THE INHERENT POWER**, in the absence of constitutional limitation upon their powers, to punish as a contempt any act, whether committed in or out of their presence, which tends to impair, embarrass, or obstruct them in the discharge of their duties, and the legislature, while it may regulate the procedure and enlarge the power, cannot fetter it. *In re Shortridge*, 78.
2. **THE FINDING OF A COURT THAT CONTEMPT HAS BEEN COMMITTED IS NOT CONCLUSIVE** in a proceeding by a writ of review if it further appears from all the facts disclosed that the acts charged and found could, in no circumstances, constitute contempt of court. *In re Shortridge*, 78.
3. **JUDICIAL PROCEEDINGS, PUBLICATION OF.**—A statute declaring that in an action for divorce the court may direct the trial to be private, and may exclude all persons other than the parties, their witnesses, and the officers of the court, and may during the examination of one witness exclude all others, does not authorize the court to make an order that no public report or publication of any character of the testimony in the case be made, and a person not a party to the action nor a witness therein cannot be punished for contempt of court for his violation of such order by publishing such testimony. *In re Shortridge*, 78.
4. **JUDICIAL PROCEEDINGS, RIGHT TO PUBLISH.**—The public have a right to know and discuss all judicial proceedings, unless such right is expressly interdicted by statutory or constitutional provisions, or unless the publication prohibited by the order of the court is of such nature as to obstruct or embarrass the court in its administration of the law and the execution of the powers expressly conferred upon it. *In re Shortridge*, 78.
5. **PUBLICATION OF JUDICIAL PROCEEDINGS.**—The publication in a newspaper of a report of the testimony taken at a trial before the court sitting without a jury, containing no reflection upon the judge, and nothing to intimidate any witness or other person connected with the trial, cannot constitute a contempt of court, though the court has forbidden such publication. If the publication could not have interfered with the full and fair investigation of the merits of the case no contempt was committed by it, though the evidence so published was of a filthy character, such as a due regard for decency and public morals would have left unpublished. *In re Shortridge*, 78.

See WITNESSES, 1, 2.

CONTINUANCE.

See TRIAL, 5.

CONTRACTORS.

See LEGISLATURE, 4; MASTER AND SERVANT, 7; MUNICIPAL CORPORATIONS, 8.

CONTRACTS.

1. **LEX LOCI**.—The laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement. *Miller v. Wilson*, 186.
 2. **LEX LOCI—STATUTE OF FRAUDS**.—If a contract for the sale of lands is valid by the laws of the state where such lands are situated, it will be enforced in another state, even though prohibited by the statute of frauds there in force. *Miller v. Wilson*, 186.
 3. **FOREIGN CONTRACTS, PRESUMPTION AS TO VALIDITY OF**.—A contract made in another state, or in a foreign country, is presumed to have been made in accordance with the laws of the place of its execution. A violation of those laws, if relied upon as a defense, must be pleaded and proved. *Miller v. Wilson*, 186.
 4. **MANUFACTURER—THE RETENTION OF MANUFACTURED ARTICLES** upon which the manufacturer has performed labor and furnished a portion of the materials does not entitle him to recover the price agreed to be paid for such manufacture if the work was not done in the manner stipulated for, and the articles manufactured were valueless because of defects in their construction. *Mack v. Snell*, 534.
 5. **MANUFACTURE OF ARTICLES CONTRACTED FOR, DEFECTS IN, WHEN NOT WAIVED BY SILENCE OR ACCEPTANCE**.—If a contract is made for the manufacture of articles from materials furnished the manufacturer by the other contracting party, the latter, because the title is in him, may retain the manufactured articles, and is not bound to inspect them, nor to notify the manufacturer of objections thereto, and, on the latter's suing for his work, may defend on the ground that it was not performed as stipulated in the contract. *Mack v. Snell*, 534.
 6. **CONTRACT TO MANUFACTURE ARTICLES, COUNTERCLAIM FOR VIOLATION OF**. In an action to recover compensation for services rendered in manufacturing articles from materials furnished by the other contractor, the latter, on establishing that the former did not perform his work in the manner stipulated for in the contract, may recover the value of the contract to him, in case plaintiff had performed it, measured by the difference between the price agreed to be paid by the defendant and the market value of the articles had they been manufactured according to the contract. *Mack v. Snell*, 534.
 7. **CONTRACT IN WRITING, IGNORANCE OF CONTENTS, HOW FAR A DEFENSE TO ACTION ON**.—One who subscribes a written instrument cannot escape his liability thereunder, upon the ground that he did not know what he was signing, unless he proves that his signature was obtained by fraudulent misrepresentations as to its contents, or shows, as an excuse for his want of care, that a relationship of trust and confidence existed between him and the other party. *Gage v. Phillips*, 494.
 8. **ILLEGAL CONTRACTS—RESCISSION**.—While any illegal contract is executory the law will neither enforce it nor award damages, and the party paying the money or putting up the property may rescind the contract and recover back his money or property, but after the contract is executed nothing paid or delivered can be recovered. *Bernard v. Taylor*, 693.
- See **AGENCY**, 3, 4; **BAILMENTS; CARRIERS**, 8; **CONSTITUTIONS**, 6; **CORPORATIONS**, 6, 14; **MISTAKE**, 1; **PARTNERSHIP**, 3-6; **STATUTES**, 10-13 **VENDOR AND PURCHASER**.

CONTRIBUTION.
See JOINT LIABILITY.

CONVERSION.

See APPEAL, 9; ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 7; TRUSTS,
1-4.

CORPORATIONS.

1. A PROMOTER is one who brings about the incorporation and organization of a corporation. Every person acting by whatever name in the formation and establishment of a company at any period prior to its incorporation occupies a fiduciary relation towards it. He is an agent of the corporation, and subject to the disabilities of its agents. *Bosher v. Richmond etc. Land Co.*, 879.
2. A PROMOTER IS GUILTY OF A BREACH OF TRUST if he sells property to the corporation purchased after he begins promoting and without informing the company that the property belongs to him, or if he accepts a bonus or commission from one who sells property to the corporation. *Bosher v. Richmond etc. Land Co.*, 879.
3. IF A SUBSCRIPTION FOR SHARES HAS BEEN OBTAINED BY FRAUDULENT REPRESENTATIONS, it may be annulled by the subscribers at any time before other equities have intervened. *Bosher v. Richmond etc. Land Co.*, 879.
4. ONE INDUCED BY FRAUD TO SUBSCRIBE TO STOCK of a corporation may maintain a bill in equity to restrain suits at law upon his undertakings and to set aside the contract of subscription, and also, if he wishes, may recover back payments already made. *Bosher v. Richmond etc. Land Co.*, 879.
5. JOINDER IN SUITS TO SET ASIDE SUBSCRIPTIONS TO.—Several persons who by the same fraudulent misrepresentations are induced to subscribe for stock in a corporation may join in an action against the corporation and its promoters who are implicated in such frauds, to set aside their subscriptions and to recover moneys paid thereon. *Bosher v. Richmond etc. Land Co.*, 879.
6. RIGHT OF STOCKHOLDER TO CONTRACT WITH LESSEE OF CORPORATION. A stockholder in a corporation who has filed a bill to enjoin a lease of the corporate lands, may make a valid contract with the tenant of the corporation by which such stockholder upon discontinuing his suit is to receive from such tenant a bonus for each ton of coal mined by the latter. The fact that such stockholder subsequently becomes a director in the corporation does not affect his right to receive such bonus, unless the circumstances and conditions surrounding the parties become in some manner changed. *Bird Coal etc. Co. v. Humes*, 727.
7. INDIVIDUAL LIABILITY OF STOCKHOLDERS UNDER CONSTITUTION OF KANSAS.—Although the supreme court of Kansas has not decided, in terms, that the constitutional provision relative to the individual liability of the stockholders of corporations is self-executing, it has fully recognized, and, in effect held, that stockholders of corporations organized under the constitution and statutes of that state are individually liable to the creditors of such corporation to an additional amount equal to the stock owned by them. *Fowler v. Lamson*, 163.

8. **ENFORCEMENT OF INDIVIDUAL LIABILITY OF STOCKHOLDERS, SPECIAL REMEDIES FOR.**—Since the individual liability of stockholders of corporations exists only by force of some constitutional or statutory provision, and the person incurring that liability is presumed to do so subject to its enforcement by the special provision made for that purpose, and no other, the remedy thus indicated is the only one which is available for the enforcement of such liability. *Fowler v. Lamson*, 163.
9. **ENFORCEMENT OF INDIVIDUAL LIABILITY OF STOCKHOLDERS IN FOREIGN JURISDICTIONS.**—When a special remedy is given creditors of a corporation against its stockholders, the liability of the latter cannot be enforced in any state except that in which the corporation was organized. *Fowler v. Lamson*, 163.
10. **ACTIONS AGAINST STOCKHOLDERS—STATUTES OF LIMITATIONS APPLICABLE TO.**—If a statute declares that actions against stockholders to enforce a liability created by law may be brought within three years after the liability was created, the time within which an action may be maintained cannot be prolonged by the giving of a note by the corporation, or otherwise. Computation of time within which the action may be brought must commence with the creation of the original indebtedness. *Hunt v. Ward*, 87.
11. **STATUTE OF LIMITATIONS AS TO ACTIONS AGAINST STOCKHOLDERS—CONSTITUTIONAL LAW.**—Though the constitution declares that each stockholder of a corporation shall be personally liable for a portion of all its debts and liabilities contracted or incurred while he is a stockholder, the legislature may prescribe a time within which actions to enforce such liability must be commenced. *Hunt v. Ward*, 87.
12. **TRANSFER OF STOCK, WHEN DEEMED TO BE AS COLLATERAL.**—If a debtor turns stock over to his creditor without anything being said by either party in reference to buying or selling, or as to its value, such transfer will be considered to be as collateral security, and the transferee cannot be held liable for the debts of such corporation. *Borland v. Nevada Bank*, 32.
13. **DUTY OF TO KEEP PLACE OF BUSINESS WITHIN THE STATE.**—It is the duty of every corporation formed under the laws of North Carolina to keep its principal place of business, its books, and its principal office within the state, to the extent necessary to the fullest jurisdiction and visitatorial power of the state and its courts, and the efficient exercise thereof in all proper cases which concern such corporation. *Simmons v. Norfolk etc. Steamboat Co.*, 614.
14. **IF A CORPORATION FORMED UNDER THE LAWS OF THE STATE WITH-DRAWS ITS PRINCIPAL PLACE OF BUSINESS** and all its officers therefrom, the courts are authorized to decree its dissolution under a statute empowering them to dissolve a corporation for any abuse of its powers to the injury of its corporators or of its creditors or debtors. *Simmons v. Norfolk etc. Steamboat Co.*, 614.
15. **CONSTITUTIONAL LAW—RIGHT OF CORPORATION TO CONTRACT INCLUDES RIGHT TO FIX PRICE OF LABOR.**—The right to contract granted a corporation by its charter includes the right to fix the price at which labor for it will be performed, and the mode and time of payment. Each is an essential element of the right to contract, and a restriction as to either, as it is enjoyed by the community at large, is an abridgment of the constitutional right of liberty and property. *Braceville Coal Co. v. People*, 206.

16. **SALARY OF OFFICERS.**—A director in a corporation acquires no legal claim against it for services performed by him in the discharge of duties pertaining to the office, unless a compensation therefor is fixed by resolution or by-law of the corporation prior to their performance, nor will the auditing and approval of such unauthorized claim by the auditing officers of the corporation impart to it any validity. *Wood v. Lost Lake Mfg. Co.*, 651.
17. **RIGHT OF DIRECTOR TO COMPENSATION.**—FOR SERVICES PERFORMED by a director for the corporation at its instance and request, in regard to matters outside of the duties devolving upon him by virtue of his office, he is entitled to claim compensation upon a *quantum meruit*, although his compensation has not been fixed by the corporation prior to the performance of the services. *Wood v. Lost Lake Mfg. Co.*, 651.
18. **DIRECTORS OF AN INSOLVENT CORPORATION CANNOT SECURE TO THEMSELVES A PREFERENCE.** *Hill v. Pioneer Lumber Co.*, 621.
19. **DIRECTORS.**—CONFESSION OF JUDGMENT BY AN INSOLVENT CORPORATION in favor of one of its directors will not be permitted to operate as a preference to the prejudice of other creditors. A director creditor upon a debt theretofore existing cannot take advantage of his superior means of information to secure his debt as against other creditors. *Hill v. Pioneer Lumber Co.*, 621.
20. **SECRET PROFIT BY DIRECTOR.**—LIABILITY TO ACCOUNT FOR.—When a mining corporation leases its mines for a royalty of fifteen cents on each ton of coal mined, and one of its stockholders, who enters into a secret agreement with its lessee by which he receives an additional bonus of three cents on each ton mined, afterwards becomes a director in the corporation which subsequently grants the lessee a reduction of twenty per cent in the royalty by the advice of such director and without knowledge that he is receiving such additional royalty, he is entitled to receive the three cents bonus up to the time of the reduction of the royalty, but must account to the corporation for his profits made by concealing the truth at the time the reduction is given, by his advice, which is one-sixth of three cents on each ton thereafter mined. *Bird Coal etc. Co. v. Humes*, 727.
21. **SECRET PROFITS.**—A DIRECTOR in a corporation is a trustee for the entire body of stockholders, and must manage all the business affairs of the company with a view to promote its common interest. He cannot directly or indirectly derive any personal profit or advantage by reason of his position distinct from his co-shareholders. He undertakes to give his best judgment in the interests of the corporation in all matters in which he acts for it, untrammelled by any hostile interest in himself or others. All secret profits derived by him in any dealings in regard to the corporate enterprise must be accounted for to the corporation, even though the transaction in which they are made is also of advantage to the corporation. *Bird Coal etc. Co. v. Humes*, 727.
22. **POSSESSION OF OFFICER, WHEN POSSESSION OF CORPORATION.**—When an officer in a private corporation takes possession of its property, his possession is that of the corporation in the absence of any act or declaration to the contrary, and if the corporation subsequently enters into possession through another of its officers, the former officer cannot maintain forcible entry and detainer against the corporation, although prior to taking possession he purchased the property at sheriff's sale, if the time for redemption has not expired when the corporation

- takes the later possession through its second officer. *Hoffman v. Reichert*, 219.
23. **RIGHT OF OFFICER TO PURCHASE AND HOLD PROPERTY IF SOLD UNDER EXECUTION.**—The purchase by one of its officers of the property of a corporation sold under execution gives him no title nor right to take possession in his own right, if the time for redemption from such sale has not expired. *Hoffman v. Reichert*, 219.
24. **DUTIES OF OFFICERS IN.**—The officers of a corporation impliedly undertake to give it the benefit of their best care and judgment and to use the powers conferred upon them solely in the interest of the corporation. They have no right, under any circumstances, to use their official positions for their own benefit nor for the benefit of anyone except the corporation itself. *Hoffman v. Reichert*, 219.
25. **REMEDY OF OFFICER AS CREDITOR.**—If a private corporation is indebted to one of its officers for private funds expended by him on its property, and refuses to pay him, he has the right to obtain judgment against it, levy execution upon and sell its property the same as any other creditor. *Hoffman v. Reichert*, 219.
26. **OFFICER IN CANNOT ACT IN HIS OWN INTEREST.**—An officer in a private corporation has no right to avail himself of his position as such officer, to obtain possession of the corporate property, and then use the advantage thus gained for his own private interest. *Hoffman v. Reichert*, 219.
27. **MASTER AND SERVANT—PLEADING IN ACTION AGAINST CORPORATION.**—The declaration in an action in which a corporation is sued by one of its servants for negligence need not show affirmatively by express averments that the injury complained of was caused by the negligent acts of agents or servants of the defendant, who were not fellow-servants of the plaintiff. It is enough to allege that the defendant, that is, the corporation itself, negligently did the acts complained of. Such an allegation excludes, *ex vi termini*, the theory that they were performed by parties for whose conduct the defendant was not responsible. *Lilly v. Scherman*, 191.
- See **AGENCY**, 3, 4; **ASSIGNMENT FOR THE BENEFIT OF CREDITORS**, 4, 5; **MANDAMUS**, 1; **MUNICIPAL CORPORATIONS**; **NEGOTIABLE INSTRUMENTS**, 4, 17; **PATENTS**, 4; **STATUTES**, 2, 12.

COTENANCY.

- EJECTMENT BY COTENANT—MEASURE OF RECOVERY.**—The owner of an undivided one-fourth interest in land, who, acting solely for himself, sues in ejectment to recover the whole tract from a party in possession under an adverse title, can recover possession of his own share only if it appears that he and the holder of the remaining three-fourths have no community of interest, and claim under different titles. *King v. Hyatt*, 304.

COUNTIES.

See **MUNICIPAL CORPORATIONS**, 15, 18, 19.

COURTS.

See **CONTEMPT**; **JURISDICTION**; **MANDAMUS**, 2; **PROHIBITION**.

COVENANTS.

See **EASEMENTS**, 3; **LANDLORD AND TENANT**, 1, 2, 6-8, 14, 18.

CREDITOR'S SUIT.

- A CREDITOR'S BILL CANNOT BE SUSTAINED UNLESS** it is shown that the remedies at law have been exhausted, or must be unavailing. *Herrlich v. Kaufmann*, 50.

See EXECUTION, 7, 8.

CRIMINAL LAW.

- 1. ATTEMPT TO COMMIT CRIME, AND PREPARATION FOR ATTEMPT DISTINGUISHED.**—Preparation for an attempt to commit a crime consists in devising the means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission, after the preparations are made. *State v. Lung*, 505.
 - 2. INTOXICATION AS DEFENSE TO CRIME.**—Mere intoxication from the recent use of ardent spirits does not excuse or mitigate the degree or penalty of any crime. Such intoxication must go to the extent of producing temporary insanity before it can mitigate the penalty, or be considered in murder cases to determine the degree of murder. *Evers v. State*, 811.
 - 3. INTOXICATION AS DEFENSE TO CRIME.**—Mere intoxication is no defense in any criminal prosecution, regardless of the constituent elements of the crime. Temporary insanity produced by recent intoxication is not a defense to any crime, but is permitted to be shown in murder cases to determine the degree, and in all criminal prosecutions to mitigate or lessen the penalty. *Evers v. State*, 811.
 - 4. INTOXICATION AS DEFENSE TO CRIME.**—A sane man who voluntarily puts himself in such a state of intoxication as to have no control over his will or actions is held to intend the consequences springing therefrom, and cannot plead his intoxication as a defense for any criminal act committed by him while in such condition. *Evers v. State*, 811.
 - 5. SETTLED INSANITY ARISING FROM DELIRIUM TREMENS** produced by alcoholism is a complete defense to crime. *Evers v. State*, 811.
 - 6. INSANITY AS DEFENSE FOR CRIME.**—Insanity, whose remote cause is habitual drunkenness, is an excuse for crime committed by a party while so insane, but not intoxicated or under the influence of liquor. *Evers v. State*, 811.
 - 7. INSANITY AS DEFENSE TO CRIME.**—Insanity is not considered as an excuse or defense to crime unless it deprives a person of the capacity to distinguish right from wrong as to the particular act charged. If a person has knowledge and consciousness that the act he is doing is wrong and will deserve punishment, whatever be his mental weakness, he is in law of sound mind and memory, and subject to punishment, but if he is incapable of having such knowledge and consciousness, he is insane, and not responsible for the crime committed by him. *Evers v. State*, 811.
- See ASSAULT; EVIDENCE, 1; FORGERY; IMPRISONMENT; INCEST; INTOXICATING LIQUORS; NEW TRIAL; RAPE; SEDUCTION; SODOMY; STATUTES, 6-9; TRIAL, 4-11; WITNESSES, 1, 2.**

CURTESY.

- 1. TENANCY BY THE CURTESY EXISTS IN FAVOR OF A HUSBAND IN LANDS WHICH HE HAS CONVEYED TO HIS WIFE** by deed of general warranty, if such deed does not specify that the property shall be held for the sole and separate use and benefit of the wife, and that her husband shall have no interest or title in or control over the same. *Doming v. Miles*, 464.

2. **TENANT BY THE CURTESY MAY CONVEY HIS TITLE** by deed or mortgage, and a mortgage by him, though purporting to be of the fee, is enforceable against his interest in the property. *Deming v. Miles*, 484.

CUSTODY.

See PARENT AND CHILD.

DAMAGES.

1. **MEASURE OF DAMAGES FOR THE VIOLATION OF A CONTRACT** includes all damages caused by the breach, or such as being incidental to the act of omission or commission as a natural consequence thereof, may reasonably be presumed to have been in the contemplation of the parties when the contract was made. *Spencer v. Hamilton*, 611.
 2. **MINING DEBRIS—MEASURE OF DAMAGES.**—In an action by a lower riparian proprietor to recover for injury received by the deposit of mining refuse upon his land and caused by the negligence of an upper proprietor and mine-owner, the measure of damages is the cost of removing the debris, or if that is impracticable then the difference in the rental value of the land caused by the descent of the refuse matter upon it. *Elder v. Lykens Valley Coal Co.*, 742.
 3. **MEASURE OF BETWEEN LESSOR AND LESSEE.**—If a lessor covenants to clean out certain ditches on the leased premises, and fails to do so, he is answerable, and the measure of damages is the amount which the net yield of the lessee's crop was lessened by the failure to put the land in the condition stipulated for in the lease, though he might himself have cleaned out the ditches for a less sum. *Spencer v. Hamilton*, 611.
 4. **MEASURE OF WHEN PARTY INJURED MIGHT HAVE SUPPLIED THE OMISSION FROM WHICH THE INJURY RESULTED.**—When a lessor contracts to clean out certain ditches, and fails to do so, the lessee's right of recovery is not limited to the amount which it would have cost him to do the work which the lessor covenanted to perform. *Spencer v. Hamilton*, 611.
 5. **DAMAGES FOR NEGLIGENCE—PLEADING.**—Plaintiff, in an action to recover for damages to his building caused by the negligence of an adjoining owner, cannot recover for injuries to his leasehold when his petition contains no allegation in respect thereto, and all the damages claimed are of a special character, as set forth in an itemized account filed with and made a part of the petition. *Flesh v. Lindsay*, 374.
 6. **DAMAGES FOR PERMANENT INJURY, UNDER WHAT ALLEGATIONS RECOVERABLE.**—A declaration which expressly says that a horse was greatly injured and damaged, and became sick, bruised, etc., and so remained for a long space of time, during which the plaintiff was put to great expense in taking care of the animal, and was deprived of its use, permits the recovery of damages for the permanent injury to such horse, as well as the value of his services while disabled. *La Duke v. Township of Exeter*, 357.
- See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 7; CONTRACTS, 8; EMINENT DOMAIN; INJUNCTION, 2, 5; JUDGMENTS, 5; JURISDICTION, 1; LANDLORD AND TENANT, 18; LIBEL, 1-3, 8; MUNICIPAL CORPORATIONS, 2; NEGLIGENCE; TELEGRAPH COMPANIES.

DAMNUM ABSQUE INJURIA.

See REAL PROPERTY, 2-8.

DEBRIS.

See DAMAGES, 2; WATERS; WITNESSES, 9, 10.

DEBT.

See IMPRISONMENT.

DEBTOR AND CREDITOR.

DEBTOR AND CREDITOR—EXTINGUISHMENT OF DEBT, WHEN NOT EFFECTED.

A debtor who seeks to pay a debt through his debtor, thereby securing his own claim, acts at his peril, and is not exonerated from his obligation until his debtor performs his part by satisfying the creditor. *State Bank v. Byrne*, 332.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS; CORPORATIONS, 12, 24; FRAUDULENT CONVEYANCES; INSOLVENCY; PAYMENT, 1, 2; SUBROGATION, 1, 2.

DEEDS.

1. **RECORDING OF, WHEN COMPLETE.**—Under a statute providing that every deed entitled to be recorded shall be recorded as of the time when it was delivered to the clerk for that purpose, and shall be considered recorded from the time of such delivery, it is conclusive notice to all subsequent purchasers and mortgagees, whether actually recorded or not. *Deming v. Miles*, 464.

2. **THE DESTRUCTION OF THE RECORD OF A DEED** does not impair the effect of such record as notice to subsequent purchasers and encumbrancers. *Deming v. Miles*, 464.

3. **VENDOR AND PURCHASER—STATUTE OF FRAUDS—DEED DEPOSITED IN GROW, WHEN NOT A SUFFICIENT MEMORANDUM.**—Where the owner of land, without making a valid executory contract to convey it, deposits a deed of it with a third person to be delivered to the grantee upon certain terms, he may cancel the instructions given to such third person, and recall the deed at any time before the specified terms have been complied with, nor can such deed, invalid as a conveyance for want of delivery, be considered as a memorandum in writing, signed by the owner agreeing to convey the land therein described so as to authorize a decree of specific performance. A deed which has not been delivered is not, by its own force and aside from any contract to which it may be related, a sufficient writing to meet the requirements of the statute of frauds. *Kopp v. Reiter*, 156.

4. **CANCELLATION OF FOR FRAUD.**—If a person living in the vicinity of a tract of land falsely represents to the owner living in another state, who is old, and feeble in body and mind, with no knowledge of the location or value of the land, that he has a valid tax title to it, and that unless the owner accepts a grossly inadequate sum offered and executes a conveyance to him he will never get anything, and the owner, relying upon these and other false representations as true, accepts the amount offered and executes the conveyance, he is entitled to have it canceled for fraud upon restoration of the amount so received and application seasonably made, although he might have discovered the fraudulent representations as to the tax title by a search of the records in the state where the land is situated. *Mallick v. Shaffer*, 270.

See CURTESY; EQUITY, 2; ESTATE, 8; EVIDENCE, 10; FRAUDULENT CONVEYANCES, 2; VENDOR AND PURCHASER, 2, 5, 6.

DECLARATIONS.

See ADVERSE POSSESSION, 2; AGENCY, 5, 6; EVIDENCE, 3, 4; GIFTS, 1;
HOMICIDE, 2, 3; INCEST, 5, 6; RAILROADS, 11, 12; RAPE, 4, 5.

DE FACTO.

See HOMICIDE, 11; OFFICERS, 1-4, 7; PROMITTOR, 4.

DEFINITIONS.

"Agent." *Flesh v. Lindsay*, 374.
 "Children." *Chapin v. Crow*, 213.
 "Civil office of profit." *State v. Clarke*, 517.
 De facto officer. *Walcott v. Wells*, 478.
 Dower. *Ficklin v. Ricey*, 891.
 "Due process of law." *Braceville Coal Co. v. People*, 236.
 Good Health. *Hann v. National Union*, 365.
 "Knowingly." *Simon v. State*, 802.
 "Law of the Land." *Braceville Coal Co. v. People*, 236.
 Liberty. *Braceville Coal Co. v. People*, 206.
 Peddler. *State v. Lee*, 649.
 "Sack." *Edwards v. San Jose Printing Society*, 70.
 Sales. *State v. Wingfield*, 406.
 "Servant." *Flesh v. Lindsay*, 324.
 Subrogation. *Liles v. Rogers*, 627.

DELIRIUM TREMENS.

See CRIMINAL LAW, 5.

DELIVERY.

See CARRIERS, 1-6; GIFTS, 4.

DEMURRER.

See MORTGAGES, 5.

DEPOSITIONS.

See TRIAL, 11.

DEPRESSING BIDS.

See JUDICIAL SALES, 2.

DEVISE.

See LEGACY; WILLS, 2.

DIRECTORS.

See CORPORATIONS, 6, 15-22.

DISCRIMINATION.

See STATUTES, 2, 15, 17.

DIVORCE.

See MARRIAGE AND DIVORCE.

DORMANT.

See EXECUTION, 1.

DOWER.

1. THE RIGHT OF DOWER IS AN EXISTING LIEN OR ENCUMBRANCE and not a mere possibility or contingency, which is to be deemed an encumbrance only when it becomes consummate by the death of the husband. *Ficklin v. Rixey*, 891.
2. A RIGHT OF DOWER IS SUPERIOR TO ALL JUDGMENT LIENS ACCRUING AFTER THE MARRIAGE. *Ficklin v. Rixey*, 891.
3. A POST-NUPTIAL SETTLEMENT UPON CONSIDERATION OF THE RELEASE OF THE WIFE'S RIGHT OF DOWER, or upon any other valuable consideration, is good in equity though void by the common law, and the husband's creditors by judgments recovered after his marriage are bound by such settlement. *Ficklin v. Rixey*, 891.

DRAFTS.

See PAYMENTS.

DRAINAGE.

See WATERS, 3.

DRUNKENNESS.

See CRIMINAL LAW, 2-6.

DUE PROCESS OF LAW.

See STATUTES, 2.

EASEMENTS.

1. EASEMENT OF LIGHT—PRESCRIPTION.—The prevalent rule in the United States is, that an easement in the unobstructed passage of light over an adjoining close cannot be acquired by prescription. *Keating v. Springer*, 175.
2. EASEMENT OF LIGHT, WHEN NOT IMPLIED FROM GRANT OF LAND.—A grant of the right to the use of light and air is not implied from the conveyance of a house with windows overlooking the land of the grantor; nor, where the owner of two adjacent lots conveys one of them, will a grant of an easement of light and air be implied from the nature and uses of the structure existing on the lot at the time of the conveyance, or from the necessity of such easement to the convenient enjoyment of the property. *Keating v. Springer*, 175.
3. THE RIGHT TO HAVE LIGHT AND AIR enter the windows of a building over an adjoining lot may exist by express grant or covenant. *Keating v. Springer*, 175.

See LANDLORD AND TENANT, 1; MUNICIPAL CORPORATIONS, 1, 2; REAL PROPERTY, 7.

EJECTMENT

PLEADING—STATUTE OF LIMITATIONS.—IN EJECTMENT defendant may prove prescriptive title in support of his general denial of the plaintiff's ownership. *Cheatham v. Young*, 617.

See ADVERSE POSSESSION, 3; COVENANT; HUSBAND AND WIFE, 4.
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EMINENT DOMAIN.

1. A JUDGMENT IN EMINENT DOMAIN PROCEEDINGS NECESSARILY INCLUDES THE DAMAGES to an owner of property abutting upon a public street arising from the impairment or obstruction of his easements in such street by the proper construction of a railway or other contemplated improvement, and therefore, he cannot subsequently sustain an action to recover additional compensation for damages suffered from the impairment of such easement. *Atchison etc. Ry. Co. v. Forney*, 450.
2. A JUDGMENT FIXING THE DAMAGES TO PROPERTY IN EMINENT DOMAIN proceedings is conclusive of all damages to such property suffered by the owners thereof resulting from the proper construction of a railway or other improvement for the purpose for which compensation is sought. *Atchison etc. Ry. Co. v. Forney*, 450.
3. ASSESSMENT OF DAMAGES—PRESUMPTION.—In proceedings to condemn land for the opening of a street, it will not be presumed that the city will make sufficient improvement of the land taken to offset damages to land not taken when no improvement has been, and never may be, ordered to be made. *Washington Ice Co. v. Chicago*, 222.
4. ASSESSMENT OF DAMAGES—DATA FOR BASIS OF ESTIMATE.—When, in proceedings to condemn land for the opening of a street, the benefits to flow from the making of the improvement necessarily depend on the manner in which it is to be made, *data* of its nature and character must be furnished from which an intelligent estimate of benefits can be made, and in no other way can evidence of benefits to accrue, or the view of the jury aid them in arriving at just compensation, and in whatever mode such *data* is furnished it must be specific and binding, and the judgment in condemnation is not conclusive upon the landowner unless the improvement is made in substantial compliance with the *data* furnished. *Washington Ice Co. v. Chicago*, 222.
5. SETTING OFF BENEFITS AGAINST DAMAGES.—For land taken for a public use no benefits to land not taken can be set off, but payment of the compensation for the damages accruing to the land not taken may be made in benefits to the property not common to the other property affected, that is, the special benefits accruing to the particular property may be set off against the damages done to the land not taken by the improvement so that if the special benefits equal or exceed the damages the owner can recover nothing as damages to property not taken; if less he will recover the difference only. *Washington Ice Co. v. Chicago*, 222.
6. ASSESSMENT OF DAMAGES—SETOFF OF BENEFITS.—In proceedings to condemn a strip of land for the opening of a city street out of a larger tract, it is error to instruct the jury that in assessing damages to land not taken it should setoff all benefits caused by the proposed improvement, when the entire tract consists of an ice-pond and it is not shown that the city intends to improve the proposed street by building it up to a grade above the level of the water. There can be no benefit to such land unless the proposed street is so improved after being opened as to be passable, and open to ordinary travel. *Washington Ice Co. v. Chicago*, 222.
7. ASSESSMENT OF DAMAGES—SETOFF OF BENEFITS.—Private property cannot be damaged for public use without just compensation. While damages to the property not taken may be set off by special benefits

accruing from the improvement, such benefits must be real and not chimerical. *Washington Ice Co. v. Chicago*, 222.

3. **INSUFFICIENCY OF ORDINANCE AS BASIS FOR BENEFITS TO LAND NOT TAKEN.**—An ordinance for the opening of a street across a large tract of land which fails to state the character or nature of the improvement to be accomplished, further than the opening of the street, or to establish a grade, or to bind the petitioner to do more than open the street, does not constitute a basis for the introduction of evidence of benefits to accrue to the landowner as to the part of his land not taken, or for an instruction based upon an estimate of benefits to be derived from the street as giving to him access to all parts of his land and thus making it desirable for manufactories. An estimate of benefits formed upon such basis is improper, and cannot be received as a setoff to the damages resulting to the land not taken. *Washington Ice Co. v. Chicago*, 222.

See MUNICIPAL CORPORATIONS, 4; RAILROADS, 29.

EQUITABLE CONVERSION.

See WILLS, 4.

EQUITY.

1. **TRESPASS—JURISDICTION TO ENJOIN.**—To give equity jurisdiction to enjoin a trespass the complainant's title must be admitted or legally established, and the trespass must be one which will cause irreparable damage, for which money cannot atone. Inadequacy of the legal remedy is the foundation and indispensable prerequisite for the interposition of equity. *Carney v. Hadley*, 101.
 2. **LACHES.**—ONE COMMENCING A SUIT WITHIN TWO AND A HALF YEARS after the making of a deed to set it aside for fraud is not precluded by laches from maintaining such suit. The defense of laches is in equity only permitted to defeat an acknowledged right on the ground of its affording evidence that the right has been abandoned. *Cottrell v. Watkins*, 897.
- See CORPORATIONS, 4; DOWER, 3; ESTOPPEL; EXECUTION, 7; INJUNCTION; JUDGMENTS, 10; MORTGAGES, 2; NEGOTIABLE INSTRUMENTS, 6; VENDOR AND PURCHASER, 1.

ERROR.

See APPEAL; EVIDENCE, 9; JUDGMENT, 1; PROHIBITION, 2.

ESCROW.

See DEEDS, 3; NEGOTIABLE INSTRUMENTS, 15.

ESTATES.

1. **CONVEYANCES—TERM "CHILDREN," IN ITS NATURAL SENSE, IS A WORD OF PURCHASE,** and when used in a deed should be taken to have been so used, unless so controlled and limited by other expressions showing that it was intended as a word of limitation. *Chapin v. Crow*, 213.
2. **REMAINDERS—MEANING OF TERM "CHILDREN" IN DEED CREATING.**—When a remainder is conveyed to two sons of a life tenant under a deed providing that if either of such sons shall die without issue the survivor shall take all, but if one of them shall die leaving issue one-half shall then go to the survivor and the remaining half to the children of the deceased, the children of the son dying before the termination of the

particular estate take not as heirs of the dead son but as purchasers under the deed. *Chapin v. Crow*, 213.

2. **VESTED AND CONTINGENT REMAINDERS DISTINGUISHED.**—A vested remainder, whereby a vested interest passes to the remainderman, though to be enjoyed *in futuro*, is, where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. A contingent remainder, whereby no present interest passes, is where the estate in remainder is limited to take effect either to a dubious or uncertain person, or upon a dubious and uncertain event. *Ducker v. Burnham*, 135.
4. **VESTED AND CONTINGENT REMAINDERS.**—A remainder limited upon a life estate with a power of sale added is not made contingent by the fact of its being uncertain, whether such power will be actually exercised or not. *Ducker v. Burnham*, 135.
5. **VESTED REMAINDERS EXIST WHEN** the estate is invariably fixed, to remain to a determinate person after the particular estate is spent. In cases of vested remainders, a present interest passes to a fixed person, or class of persons, to be enjoyed in future. *Chapin v. Crow*, 213.
6. **REMAINDERS.**—**CONTINGENT REMAINDERS ARE NOT FAVORED**, and unless it is manifest from the language of the instrument that a contrary result is intended an estate is regarded as vested and not contingent, but effect must be given to the language employed; and if an estate upon contingency is created, it must be so declared. *Chapin v. Crow*, 213.
7. **CONTINGENT REMAINDERS EXIST WHEN** no present interest passes and the estate in remainder is limited to take effect either to a dubious and uncertain person, or upon a dubious or uncertain event, so that the particular estate may chance to be determined and the remainder never take effect. *Chapin v. Crow*, 213.
8. **REMAINDERS—DEED CREATING CONTINGENT REMAINDER.**—A deed conveying land to A and his assigns during his natural life and upon his death, then to his two sons, "to their heirs and assigns forever in equal parts, if they shall both survive the said A, but if either shall die without issue him surviving, then the survivor shall take all the said property hereby conveyed, but if one of said sons shall die leaving issue, then one moiety to the survivor, and the other moiety in equal parts to the children of the deceased," creates an estate in the sons, contingent upon their surviving the life tenant, or if one of them should die and not the other, that the deceased son should have died without issue him surviving. *Chapin v. Crow*, 213.
9. **REMAINDER, WHEN NOT CONTINGENT.**—A remainder limited upon a life estate, with a power of sale added, is not made contingent by uncertainty as to the amount of the estate which will be left undisposed of at the expiration of the life estate, but by uncertainty as to the persons who are to take such remainder. *Ducker v. Burnham*, 135.
10. **ESTATE UPON CONDITION SUBSEQUENT, WHEN VESTS.**—An estate limited upon a contingency, to which the effect of a condition subsequent is given, vests at once, subject to be divested upon the happening of the contingency. Whether the condition is really precedent or subsequent depends upon whether it is incorporated into the gift to or description of the remainderman, or is added as a separate clause after words which have already given a vested interest. *Ducker v. Burnham*, 135.
11. **REMAINDER LIMITED UPON ESTATE FOR LIFE WITH POWER OF SALE.** A power of sale added to a life estate does not raise the estate to

a fee. Hence, although a will creates a life estate, with power to sell and convey the fee, it may at the same time limit a remainder after the termination of the life estate. *Ducker v. Burnham*, 135.

See WILLS, 1.

ESTOPPEL.

1. **EQUITABLE ESTOPPEL DEPENDS UPON THE FACTS AND CIRCUMSTANCES** of each particular case. *Terrell v. Weymouth*, 94.
 2. **EQUITABLE ESTOPPEL AS TO TITLE TO LAND** is such conduct as prevents a party from setting up his legal title, because he has, through his acts, words, or silence, led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience. *Terrell v. Weymouth*, 94.
 3. **EQUITABLE ESTOPPEL TO ATTACK PARTITION SALE.**—One of three minors, two brothers and a sister, having an equal undivided interest in land, sold under void partition proceedings, and purchased by their guardian for the other two, who receives his full share of the proceeds of such sale upon coming of age, and thereafter and after the death of his brother leaving himself and his sister sole heirs of such deceased brother's share, and with knowledge that his sister has conveyed her three-fourth's interest in the land, conveys the remaining one-fourth interest to her grantee, asserting that such interest is derived by descent from his deceased brother, and is all the interest he has or can claim in the land, is estopped after the lapse of seven years from assailing the validity of the partition sale. *Terrell v. Weymouth*, 94.
- See EXECUTION, 2, 3; JUDGMENTS, 6; LANDLORD AND TENANT, 16.

EVICTIION.

See LANDLORD AND TENANT, 3-5, 10, 18.

EVIDENCE.

1. **EVIDENCE WHICH IS ADMISSIBLE AS TENDING TO MAINTAIN THE THEORY OF DEFENSE** in a criminal case, if offered by it for that purpose, is not rendered incompetent because offered by the prosecution. *Miller v. State*, 836.
2. **CONFESSIONS—ADMISSIBILITY OF.**—To authorize a confession of guilt made with an agreement to turn state's evidence to be admitted on the subsequent trial of the party making it, it must appear not only that it was made freely and without compulsion or persuasion, but if the defendant was under arrest, in jail, or other place of confinement it must be further shown that the confession was made voluntarily after he had been first cautioned that it might be used against him. If the party, after being so cautioned, has been threatened or persuaded into making it, in the hope that he will be permitted to turn state's evidence and thereby gain immunity from punishment, in no event can the confession so obtained be used against him if he subsequently repudiates the agreement, and refuses to testify as a witness for the state. *Lauderdale v. State*, 788.
3. **DECLARATIONS AS RES GESTÆ.**—In order to constitute declarations a part of the *res gestæ* it is not necessary that they were precisely coincident in point of time with the principal fact. If they spring out of it, were voluntary and spontaneous, and made at a time so near it as to

- preclude the idea of deliberate design, they may be regarded as contemporaneous, and admitted in evidence. *Castillo v. State*, 794.
4. THE DECLARATION OF AN ALLEGED DONEE OF A GIFT CAUSA MORTIS, made while the donor is still alive, to the effect that the gift had been made by him to her, is admissible in evidence in her favor to rebut other testimony tending to prove that at a later day she did not claim the making of such gift. *Thomas v. Lewis*, 848.
 5. COLLATERAL SECURITY.—IF A DEBTOR DEPOSITS PROPERTY WITH HIS CREDITOR, the presumption, in the absence of any evidence to the contrary, is, that such deposit was made and received as collateral security for the debt, and unless evidence is offered to rebut this presumption, the law makes a positive inference that the assignment is only as collateral security. *Borland v. Nevada Bank*, 32.
 6. JUDGMENT, PAROL EVIDENCE OF THE GROUNDS OF.—If the record does not disclose on what cause of action or of defense the judgment was based, evidence is admissible to show what issues were tried and settled by the findings and judgment, provided such evidence is consistent with the record. *Atchison etc. Ry. Co. v. Forney*, 450.
 7. CONTRACT REDUCED TO WRITING, PAROL EVIDENCE INADMISSIBLE TO VARY TERMS OF.—A contract which has been reduced to writing, and is not alleged to be tainted with fraud or executed by mistake, cannot be varied by parol evidence of the contents of lost letters which passed between the parties before it was executed. *Gage v. Phillips*, 494.
 8. JUDGMENT IN EMINENT DOMAIN PROCEEDINGS.—PAROL EVIDENCE IS NOT ADMISSIBLE to prove that the jury in assessing the damages in a condemnation proceeding did not take into consideration depreciation in the value of land abutting upon a public alley by the construction of a railroad track upon such alley, when such track was already constructed when they visited the premises for the purpose of assessing the damages thereto. *Atchison etc. Ry. Co. v. Forney*, 450.
 9. APPELLATE PROCEDURE—EXTRINSIC EVIDENCE TO SUPPLY DEFECTS IN THE RECORD.—When a case is presented to the appellate court upon a case made and not upon a transcript, the rulings of the lower court complained of and assigned as error must be disclosed by, and embodied in, the case itself, and cannot be shown by extrinsic evidence, not even by the certificate of the judge, but it may be shown by extrinsic evidence that the case was made and served within proper time and that it was properly settled and signed in time by the trial court although this is not shown by the case itself or by any certificate of the court. *Jones v. Kellogg*, 278.
 10. CONVEYANCE—EVIDENCE OF IDENTITY.—A statement in a deed by parents and their children conveying land of the estate of a deceased member of the family that a sister of the deceased joining in the conveyance as heir under a surname different from her maiden name is an heir of the deceased, is sufficient proof of her identity as such in the absence of opposing evidence. *King v. Hyatt*, 304.
 11. JUDICIAL NOTICE—PLEADING.—COURTS WILL UNDERSTAND WORDS IN GENERAL USE in the same sense in which they are usually understood by masses of men, and no allegation or proof of such meaning is necessary. *Edwards v. San Jose Printing Society*, 70.
 12. EVIDENCE OF THE CONTENTS OF A PUBLIC WRITING may consist of the original, identified by sufficient evidence, or of a copy thereof duly certified. *Cheatham v. Young*, 617.

13. PUBLIC WRITINGS ARE RECEIVABLE ONLY in proof of those matters, the remembrance of which they were called into existence to perpetuate. *Cheatham v. Young*, 617.
 14. THE RECORDS OF THE MEETING OF TOWN COMMISSIONERS showing the location or width of a pre-existing public street are admissible in evidence for the purpose of proving such location or width, if made before the controversy arose in the trial of which such evidence is offered. Such record, though not conclusive, is competent evidence to locate the boundary of the streets. *Cheatham v. Young*, 617.
- See APPEAL, 1; ASSAULT, 1; HOMICIDE, 1; INDICTMENT, 6; LIBEL, 7; MARRIAGE AND DIVORCE, 3; PARTNERSHIP, 4; RAILROADS, 3; RAPE, 4, 5, 7, 8; SEDUCTION, 1; STATUTES, 6; SURETYSHIP, 1; TRIAL, 6; WITNESSES.

EXCEPTIONS.

See APPEAL, 2.

EXEMPTIONS.

See ATTACHMENT, 1-3; EXECUTION, 4-6; MUNICIPAL CORPORATIONS, 13; TAXES, 1, 2.

EXECUTION.

1. EXECUTIONS ISSUED ON DORMANT JUDGMENTS.—Under a statute providing that after five years an execution shall not issue upon any judgment except on motion followed by the issuance of summons as in actions at law, an execution issued without such proceedings is not absolutely void, but merely voidable, and is not subject to collateral attack. *Eddy v. Coldwell*, 672.
2. EXECUTION SALES—ESTOPPEL TO DENY VALIDITY OF.—If land sold under a void execution and sale is purchased by a party who in good faith pays all it is reasonably worth, and enters into quiet and peaceable possession of the land, which he occupies for a number of years, making valuable improvements thereon, the owner, who resides in the near vicinity, is present at the sale, and receives the proceeds thereof without objection to such possession and occupancy, is estopped to deny the title of such purchaser, or to recover the land, although at the time of the sale he did not know that it was void. *Hazel v. Lyden*, 273.
3. EXECUTION SALES—ESTOPPEL TO DENY VALIDITY OF.—If one stands by and allows another to purchase his property in good faith at a void execution sale, and accepts the proceeds of the sale without giving the purchaser any notice of his title, he is thereby estopped to assert his title on the ground of his ignorance of the invalidity of the sale. *Hazel v. Lyden*, 273.
4. A BROKER'S SEAT IN A STOCK AND EXCHANGE BOARD is not subject to levy and sale under execution. *Lowenberg v. Greensbaum*, 42.
5. EXEMPTION OF TOOLS.—A LATHE and the appliances used in running it are exempt from execution under a statute purporting to exempt the tools and implements of a mechanic necessary to carry on his trade. *In re Robb*, 43.
6. EXEMPTION IN FAVOR OF A MECHANIC IS OPERATIVE though he uses the tool claimed as exempt in manufacturing machinery, if he uses it himself without employing others to use it in such manufacture. *In re Robb*, 43.

7. **CREDITOR'S BILLS.**—PROCEEDINGS SUPPLEMENTARY TO EXECUTION, authorized by the statutes of California, are a substitute for creditor's bills, and supplant proceedings in equity, unless some special ground exists upon which to invoke the power of chancery. *Herrlich v. Kaufmann*, 50.
8. **ACTION AGAINST GARNISHEE.**—If, under execution, a debtor of the defendant is garnished, no action can be sustained by a judgment creditor against such debtor. The only remedy is the one provided by proceedings supplemental to execution, under which, by the statute of California, the creditor must obtain an order for the debtor of the defendant to appear and answer, and upon such appearance, if the debt is admitted, an order may be made for its payment into court; and if the debt is denied, an order may be entered authorizing the judgment creditor to institute an action to recover the alleged debt. *Herrlich v. Kaufmann*, 50.
- See CORPORATIONS, 22, 24; IMPRISONMENT, 1, 3; JUDGMENTS, 12; MORTGAGES, 6; MUNICIPAL CORPORATIONS, 19.

EXECUTORS AND ADMINISTRATORS.

See JUDGMENTS, 7; PARTITION, 1; REAL PROPERTY, 1; WITNESSES, 4.

EXPERIMENTS.

See WITNESSES, 8.

EXPERTS.

See WITNESSES, 9-11.

EX POST FACTO.

See STATUTES, 6-9.

EXPULSION.

See RAILROADS, 8, 13-15.

FACTORS.

See ATTACHMENT, 2, 3.

FALSE REPRESENTATIONS.

See DEEDS, 4.

FELLOW-SERVANTS.

See CORPORATIONS, 26; RAILROADS, 23.

FINES.

See IMPRISONMENT.

FIRES.

See RAILROADS, 2, 3, 21.

FLAG STATIONS.

See RAILROADS, 13.

FLOODS.

See CARRIERS, 4; WATERS.

FORCIBLE ENTRY AND DETAINER.

JUDGMENT IN FORCIBLE ENTRY AND DETAINER, HOW FAR CONCLUSIVE.—

The judgment in a forcible detainer suit, being conclusive only as to the right of possession, and, in a certain class of cases, as to the existence of the relation of landlord and tenant between the parties, and as to the tenant's wrongful holding over, cannot operate as *res adjudicata*, so as to debar the tenant from recouping, in a subsequent action for the recovery of the rent of the demised premises, the damages which he has sustained through the landlord's breach of the covenants in the lease. *Keating v. Springer*, 175.

See CORPORATIONS, 21; LANDLORD AND TENANT, 15.

FORECLOSURE.

See LIMITATIONS OF ACTION; MORTGAGES, 4-6.

FORFEITURE.

See LANDLORD AND TENANT, 11, 12.

FORGERY.

1. **WHAT MAY BE SUBJECT OF.**—A writing void on its face cannot be the subject of forgery. While the writing alleged to be forged must, if genuine, have some legal efficacy, or be the foundation of some legal liability, yet it is not always necessary that it should be enforceable to be the subject of forgery. It is sufficient if it may be the basis of an action, or of such a character that it may defraud, or injuriously affect, the rights of another. *State v. Dunn*, 704.
2. **FORGERY OF NOTE BARRED BY LIMITATION.**—A note which appears upon its face to be barred by the statute of limitations may be the subject of forgery. *State v. Dunn*, 704.

See BANKS.

FRAUD.

PLEADING.—When fraud is alleged, the pleading is insufficient unless the facts constituting the fraud are also averred. *Clough v. Holden*, 393.

See CORPORATIONS, 4, 5; DEEDS, 4; EQUITY, 2; EVIDENCE, 7; FRAUDULENT CONVEYANCES; LIMITATIONS OF ACTIONS, 2, 3; NEGOTIABLE INSTRUMENTS, 1-3; SPECIFIC PERFORMANCE.

FRAUDULENT CONVEYANCES.

1. **EVIDENCE SUFFICIENT TO SHOW FRAUD.**—A finding by a referee and a trial judge that a conveyance of land to the grantor's wife was fraudulent is sufficiently sustained by testimony showing that the grantor, if not insolvent at the time of the conveyance, became so not long afterwards; that he executed the deed with the avowed purpose of securing a home for his family if "something were to turn up"; that he went on getting deeper and deeper into debt, finally landing in utter insolvency; and that he subsequently mortgaged the land conveyed without giving the mortgagee any notice of the conveyance. *Jackson v. Plyler*, 782.

2. **RIGHTS OF SUBSEQUENT CREDITORS.**—An existing creditor may assent a voluntary deed, even though executed without any evil intent or fraudulent purpose whatsoever; but such a deed will not be declared void at the instance of a subsequent creditor, unless it was made with a view to future indebtedness, or attended with some other circumstance of actual fraud. *Jackson v. Plyler*, 782.

See CHATTEL MORTGAGES, 2; FRAUD; LIMITATIONS OF ACTIONS, 2.

FRAUDULENT MISREPRESENTATIONS.

See CONTRACTS, 7.

FRAUDULENT REPRESENTATIONS.

See CORPORATIONS, 3, 5.

FREIGHT.

See CARRIERS, 6, 7.

GARNISHMENT.

See EXECUTION, 8.

GAS.

See REAL PROPERTY.

GIFTS.

1. **GIFT CAUSA MORTIS.**—If a man, then dangerously ill, calls his daughter, saying to her, "Look in my pockets, and bring me my keys, my purse, and the package of papers tied with a string," and, upon their being brought by her, says: "I am going to give you these things as yours," also gives her the keys to a bureau drawer, and tells her that in it she will find two notes, and to take them out, and that they are hers, and, taking out of his purse some keys, says, "Here are my keys to my safe and a box I have in the vault at the bank; whatever you find in the safe and the vault at the bank you may have as yours, and do not let anyone get those keys away from you by any pretense," and also taking the package of papers tied with a string, says, "In this package you will find my bank book. Whatever it calls for is yours, and in the package you will also find some notes; you can have them also," and on the next day, on finding that she did not put the things where he told her, he made her bring them into his presence, and explained to her their importance, and the importance of her doing with them as he had directed, and again said, "They are yours, and you will have to take care of them," and calling a person present, said to her, "Fanny, you see me give Bettie these things," this is a good gift *causa mortis* of the property to the daughter Bettie, excepting the money represented by the bank book, and includes, with this exception, all the notes, bonds, and choses in action either then present, or contained in the safe or box referred to by the donor. *Thomas v. Lewis*, 848.
2. **A GIFT CAUSA MORTIS OF A BANK BOOK** showing the amount on deposit by the donor is not a sufficient gift of the fund so deposited. *Thomas v. Lewis*, 848.
3. **GIFTS CAUSA MORTIS.**—The fact that the donor, in making the gift, tells the donee that the property is to be hers in case of his death does not

make the gift testamentary and invalid because not executed in the form essential to a will. *Thomas v. Lewis*, 848.

4. **IN CASE OF A GIFT CAUSA MORTIS, A DELIVERY**, while essential, may be either actual or constructive. A constructive delivery is always sufficient when manual delivery is either impracticable or inconvenient. The delivery of keys of a safe or box is sufficient constructive delivery of possession of its contents, though another person has a duplicate set of keys thereto. *Thomas v. Lewis*, 848.
5. **GIFTS CAUSA MORTIS**.—THE STATUTE OF VIRGINIA providing that if the donor and the donee reside together at the time of the gift, the possession of the latter at their place of residence is not a sufficient possession to support the gift, does not apply to gifts *causa mortis*. *Thomas v. Lewis*, 848.
6. **A GIFT CAUSA MORTIS MAY BE OF ANY AMOUNT OF PROPERTY**, and is not required to be made in the presence of any stated number of witnesses. *Thomas v. Lewis*, 848.

See EVIDENCE, 4; LEGACY; LEGISLATURE.

GRAND JURY.

See INDICTMENT, 1, 4-6.

GRANTS.

See EASEMENTS, 2, 2.

HABEAS CORPUS.

See PARENT AND CHILD, 7.

HEALTH.

See INSURANCE, 8-10.

HEARSAY EVIDENCE.

See APPEAL, 12.

HEIRS.

See ESTATES, 2.

HIGHWAYS.

See MUNICIPAL CORPORATIONS, 3.

HOMESTEAD.

See SETOFF; SUBROGATION, 4.

HOMICIDE.

1. **EVIDENCE OF VIOLENT CHARACTER OF DECEASED** is not admissible on a trial for murder in the absence of any act on his part indicating any purpose whatever to take the life of the accused or to do him bodily harm. *Evers v. State*, 811.
2. **DECLARATIONS BY ACCUSED AS PART OF RES GESTÆ**.—A request or declaration made to a third party by a person under arrest for murder, within fifteen minutes after the homicide and upon being informed of his victim's death, to "tell my brother to come down here; by God,

"I have got my man!" is part of the *res gestæ*, and admissible in evidence as such. *Miller v. State*, 836.

2. EVIDENCE OF MALICE AND MOTIVE.—On a trial for the murder of a policeman, a statement made by the accused three weeks previous to the homicide, while speaking of his previous arrests by the deceased and other policemen, to the effect that in case he was arrested again, and was not allowed to give bail and had a gun with him the fight would begin right there, is admissible in evidence on the issue of malice and motive. *Miller v. State*, 836.
4. MANSLAUGHTER—INSULTING WORDS.—To reduce a homicide from murder to manslaughter because of the use of insulting words by the deceased, the killing must take place immediately upon their utterance. *Evers v. State*, 811.
5. INTOXICATION AS DEFENSE TO CRIME.—Intoxication of an accused is generally admissible, when by statute murder is divided into degrees, solely to determine the degree of the crime. *Evers v. State*, 811.
6. INTOXICATION AS DEFENSE TO MURDER.—A person accused of murder who is so excessively intoxicated at the time the act is committed as to be unconscious that he is doing wrong may plead his condition. If it appears that the design to kill was not previously formed or premeditated, but was the result of a sudden, rash, and unpremeditated design, springing out of inconsiderate or irrational action or excitement, and originating in a mind so inflamed by intoxicants as to be wholly incapable of reflection or self-control, he is guilty of murder in the second degree, but nothing less, and the jury may reduce the penalty which would otherwise attach to his crime but for his condition. *Evers v. State*, 811.
7. RESISTANCE TO ARREST.—A person expecting an attempt will be made to arrest him either legally or illegally, who deliberately prepares arms for immediate use, and calmly and deliberately threatens and determines to kill the person making such arrest unless bail is immediately accorded him, and who does kill the arresting officer when bail is refused, and when he is in no danger from any source, is guilty of killing with express malice, and the homicide is murder in the first degree. *Miller v. State*, 836.
8. MURDER—RESISTING ILLEGAL ARREST—UNKNOWN PROVOCATION.—The existence of an unknown provocation to the accused, as that the warrant for his arrest is illegal, at the time he kills an officer while resisting arrest, is not sufficient to reduce the homicide below murder. *Miller v. State*, 836.
9. MANSLAUGHTER—RESISTANCE TO ILLEGAL ARREST.—An illegal arrest is deemed in law a great provocation, and, if conceded, to constitute adequate cause yet to reduce a killing in resisting such arrest to manslaughter, sudden passion must have existed in the mind of the slayer at the time of the homicide, otherwise the killing is murder. In such case adequate cause and sudden passion must concur. *Miller v. State*, 836.
10. SELF-DEFENSE—RIGHT TO RESIST ILLEGAL ARREST.—A person illegally arrested and detained may, in a proper manner, regain his liberty, and a killing under such circumstances may be reduced to manslaughter or self-defense. But if the killing be for any other cause, as ill-will or malice, it is murder; or if more force than necessary be used, or a deadly weapon be resorted to unnecessarily in the first instance by the

arrested party, this constitutes him the aggressor, and makes the killing murder. *Miller v. State*, 836.

11. **ARREST BY CITIZEN SUMMONED BY DE FACTO OFFICER.**—A citizen summoned by a known *de facto* officer, to assist him in making an arrest of a person guilty of an open violation of law in their presence, is justified in attempting to make the arrest in good faith, and if killed by the offender while so acting in an orderly manner, the crime can be no less than murder. *Weatherford v. State*, 828.

See ASSAULT; CRIMINAL LAW, 2, 3.

HUSBAND AND WIFE

1. **TORTS OF WIFE—LIABILITY OF HUSBAND.**—A husband is liable for the torts of his wife committed by her alone and not in his presence. When, in such case, she is sued, the husband must be joined. If the wrongful act of the wife is committed in the presence and by direction of the husband, he alone is liable. *Flesh v. Lindsay*, 374.
 2. **JOINT LIABILITY OF FOR NEGLIGENCE OF WIFE'S SERVANT.**—While a married woman cannot have an "agent" as to property owned by her in fee, but not as her separate estate, yet she may employ a "servant" to improve or repair it, and herself and her husband are jointly liable for the negligence of such servant, although she alone is not liable therefor. *Flesh v. Lindsay*, 374.
 3. **LIABILITY OF HUSBAND FOR WIFE'S NEGLIGENCE.**—A husband and wife are jointly liable for damages to adjoining property caused by the negligence of her servant in repairing and remodeling a building owned by her. In such case the wife is not alone liable, and the husband must be joined in the action. *Flesh v. Lindsay*, 374.
 4. **EJECTMENT FOR WIFE'S LANDS.**—A husband being entitled to the possession of land owned by his wife, may maintain ejectment therefor without joining her in the action. *Flesh v. Lindsay*, 374.
 5. **MARRIED WOMAN IS IN NO WAY BOUND BY AN OPTION TO PURCHASE** her lands given by her husband, against which she protests as soon as it comes to her knowledge. *Graybill v. Brough*, 894.
- See ADVERSE POSSESSION, 1-3; CURTESY; DOWER, 1; FRAUDULENT CONVEYANCES, 1; MARRIAGE AND DIVORCE; SETOFF; SPECIFIC PERFORMANCE, 1; SUBROGATION, 4; VENDOR AND PURCHASER, 5; WITNESSES, 6.

IMPEACHMENT.

See INDICTMENT, 4, 6; RAPE, 8; TRIAL, 11; WITNESSES, 7.

IMPRISONMENT.

1. **CRIMINAL LAW—PUNISHMENT OF ONE CONVICTED OF BASTARDY.**—Under the statutes of South Carolina, one who has been convicted of bastardy, and fails or refuses to enter into the necessary recognizance for the support of his bastard child, may, after execution against his property has been returned wholly or partially unsatisfied, be arrested under a writ of *capias ad satisfaciendum* and committed to jail, subject, however, to the privileges accorded to insolvent debtors arrested under a similar writ. *State v. Brewer*, 752.
2. **CONSTITUTIONAL LAW—IMPRISONMENT FOR NONPAYMENT OF PENALTY.**—A constitutional inhibition against imprisonment for debt is not violated by the imprisonment of one who, after his conviction on a charge of

bastardy, has failed to pay the penalty imposed by virtue of the provisions of a statute, regulating prosecutions for that offense and expressly enabling persons so imprisoned to avail themselves of the privileges of insolvent debtors. *State v. Brewer, 752.*

2. **CONSTITUTIONAL LAW—IMPRISONMENT FOR NONPAYMENT OF FINE.**—A judgment in a bastardy proceeding, which directs that, upon default in giving the required recognizance, execution do issue as for a penalty of twenty-five dollars annually, and that the defendant be confined on execution in the jail in case the execution be returned *nulla bona* as in a *capias ad satisfaciendum*, until he shall pay twenty-five dollars and the costs, is not open to the objection, that the defendant is thereby ordered to perform what may be an impossible act, and thus be subjected to perpetual imprisonment. Such a judgment does not purport to deny him the privilege accorded by the statute of procuring his release in the same manner as other insolvent debtors. *State v. Brewer, 752.*

IMPROVEMENTS.

See EMINENT DOMAIN, 3-8; MUNICIPAL CORPORATIONS, 4, 10, 13-19; STATUTES, 20.

INCEST.

1. **CRIMINAL LAW.—THE CRIME OF ATTEMPT TO COMMIT INCEST** may be committed though the female upon whom the attempt was made did not consent, but on the contrary, resisted with force. *People v. Gleason, 56.*
2. **CRIMINAL LAW—INCEST, ATTEMPT TO COMMIT.**—The overt acts necessary to constitute the crime of attempt to commit incest are sufficiently established when the evidence tends to prove that, but for the resistance of the female, incest would have resulted from the acts done and attempted. *People v. Gleason, 56.*
3. **AN INDICTMENT charging incest** is not defective in alleging that the accused "did unlawfully intermarry," because it fails to allege affirmatively that there was a marriage, nor is it fatally defective in failing to charge that the accused "knowingly" entered into an unlawful marriage, if the statute defining incest does not employ the word "knowingly." *Simon v. State, 802.*
4. **ILLEGALITY OF MARRIAGE AS DEFENSE.**—On the prosecution of a man for an incestuous marriage, proof of his cohabitation with or carnal knowledge of a female relative within the prohibited degrees, is sufficient to establish his guilt, without proof of a valid marriage, and the fact that the person who solemnized the marriage ceremony was unauthorized to do so, does not affect the guilt of the accused, nor entitle him to an acquittal. *Simon v. State, 802.*
5. **DECLARATIONS OF PARENTS TO PROVE ILLEGITIMACY.**—On the prosecution of a man for an incestuous marriage with the daughter of his half sister by the same father, declarations by his deceased mother and father that he is an illegitimate child, not the son of his supposed father, and that there is no blood relationship between himself and his wife, are inadmissible in the absence of evidence of nonaccess between the supposed parents, or that they were living apart, or that the supposed father was impotent at the time the accused was conceived. *Simon v. State, 802.*
6. **DECLARATION OF PARENT TO PROVE ILLEGITIMACY.**—On the prosecution of a man for an incestuous marriage, the declarations of his deceased

another that he is illegitimate, though born in wedlock, made to him about the time of his marriage, are inadmissible to prove good faith on his part in entering into the marriage. *Simon v. State*. 802.

INDICTMENT.

1. **THE PROSECUTING ATTORNEY MAY BE PRESENT** before the grand jury to give advice, to interrogate witnesses, to draw such bills as the jurors are prepared to find, and to give such general instructions as they may require, but he is not to influence or direct them in respect to their finding, nor ought he to be present, when they are deliberating on the evidence, or when their vote is taken. *Gitchell v. People*, 147.
2. **PLEADING.**—AN ARGUMENTATIVE OR INDIRECT STATEMENT OF A FACT is not permissible in an indictment. Hence there is no sufficient averment of an intent to commit a crime where it is merely alleged that the defendant did the specific act charged in an attempt to commit that crime. *State v. Lung*, 505.
3. **OBJECTION TO VALIDITY OF, WHEN MUST BE TAKEN.**—As a general rule, a defendant who pleads to an indictment is deemed to admit its genuineness as a record, and, after he has been convicted, cannot object to the constitution of the grand jury. *Gitchell v. People*, 147.
4. **WHEN NOT IMPRACHABLE BY AFFIDAVITS OF GRAND JURORS.**—The affidavits of grand jurors cannot be received for the purpose of showing that twelve of their number did not concur in finding a true bill against the accused. *Gitchell v. People*, 147.
5. **SECRECY IN REGARD TO THE PROCEEDINGS OF THE GRAND JURY, TO WHOM APPLICABLE.**—The same principle which forbids disclosure by the grand jurors applies to all persons authorized by law to be present in the grand jury room, whether it be their clerk, or the officer in charge, or the prosecuting attorney. *Gitchell v. People*, 147.
6. **FOREMAN'S INDORSEMENT OF TRUE BILL, CONCLUSIVENESS OF, AS EVIDENCE.**—Where a statute expressly provides that an indorsement of a true bill upon an indictment by the foreman of a grand jury shall be evidence, that it has been found by twelve of the jurors, an indictment, when returned into court, with such indorsement properly made, becomes a judicial record, importing all the legal verity which belongs to that species of evidence, and cannot be impeached by the testimony of the members of the very body who, in the presence of their foreman, stood by in silence and saw him hand it to the court. *Gitchell v. People*, 147.

INDICTMENT.

See **INCEST**, 3; **INTOXICATING LIQUORS**, 1, 2; **WITNESSES**, 2.

INDORSERS.

See **NEGOTIABLE INSTRUMENTS**, 2, 3, 12.

INFANTS.

See **ESTOPPEL**, 3; **PARENT AND CHILD**; **PARTITION**,

INFORMATION.

See **WITNESSES**, 2.

INFRINGEMENT.

See **PATENTS**.

INJUNCTION.

1. **INSOLVENCY OF DEFENDANT** alone is not sufficient to authorize the issuance of an injunction against a trespass, but it is an important element in determining whether or not the injunction should be granted. *Carney v. Hadley*, 101.
2. **TRESPASS.—IN CASES OF REPEATED TRESPASSES** when it is necessary to quiet a rightful, admitted, or established possession, equity has jurisdiction to interpose by injunction to prevent a multiplicity of suits although a remedy exists at law. Injunction will not be granted against a person merely because he is guilty of repeated trespasses when the legal remedy affords an adequate and complete redress in damages. *Carney v. Hadley*, 101.
3. **TRESPASS.—INJUNCTION AGAINST TRESPASS TO AVOID MULTIPLICITY OF SUITS** will be granted only when several persons are controverting the same right, and each stands upon his own claim or pretension. *Carney v. Hadley*, 101.
4. **TRESPASS.—WHEN COMPLAINANT'S TITLE IS DISPUTED** an injunction to restrain a trespass will not be granted, nor will an injunction already granted be made perpetual, to prevent multiplicity of suits, until he has established his title by a successful trial at law. *Carney v. Hadley*, 101.
5. **TRESPASS.—INJUNCTION AGAINST.**—Trespass by working pine trees in the customary manner, although it greatly lessens their value as timber producers, does not, in the absence of allegations that the injury complained of amounts to a destruction of the trees or the estate, or that it cannot be adequately compensated in damages, present such a case of irreparable injury as will justify a court of equity in granting an injunction. *Carney v. Hadley*, 101.

See EQUITY, 1.

INSANITY.

See CRIMINAL LAW, 2-7.

INSOLVENT DEBTORS.

See IMPRISONMENT, 1.

INSOLVENCY.

INSOLVENCY LAW, WHAT IS.—A statute authorizing assignments to be made for the benefit of all the creditors of the assignor, and declaring that every person, whether resident within or without the state, accepting a dividend out of the assigned estate, or in any way by proving his claim or otherwise participating in the proceedings under the assignment, shall be held to have assented to, and to be bound by, any order of the court discharging the assignor from his debts, is an insolvent law; and an assignment made thereunder does not transfer title to property in another state as against a creditor attaching in such other state, although he was a resident of the state wherein the assignment was made. *Barth v. Backus*, 545.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS; CORPORATIONS, 17, 18; FRAUDULENT CONVEYANCES, 1; INJUNCTION, 1.

INSTRUCTIONS.

See APPEAL, 11; ASSAULT, 3; LIBEL, 8; TRIAL, 7-10.

INSURANCE.

1. **ACTS OF AGENT, WHEN BINDING ON COMPANY.**—The acts of an insurance agent performed within the scope of his apparent power bind his principal. Persons dealing with the agent, without knowledge of any limitations on his powers, are not bound to go beyond his apparent authority and inquire whether or not he is in fact authorized to do a particular act for his principal. *Hahn v. Guardian Ins. Co.*, 709.
2. **AUTHORITY OF AGENT.**—Persons having transactions with an insurance company which deals with the community through a local agent are entitled to assume, in the absence of knowledge as to the agent's authority, that his acts and declarations are as valid as if they proceeded directly from the company. *Hahn v. Guardian Ins. Co.*, 709.
3. **ACTS OF AGENT, WHEN BINDING UPON COMPANY.**—An insurance agent who, representing himself to be a general agent, solicits insurance, takes the application, receives the premium, and delivers the policy sent him by the company, binds the latter by his acts and conduct, in the absence of knowledge by the insured of a restriction on the agent's powers or of circumstances sufficient to put him on inquiry. *Hahn v. Guardian Ins. Co.*, 709.
4. **AUTHORITY OF AGENT CANNOT BE QUESTIONED** when the acts of the insurance company which he represents have been such as to amount to a recognition of his agency. *Hahn v. Guardian Ins. Co.*, 709.
5. **INSURANCE AGENT AUTHORIZED TO TAKE A RISK IN ONE PLACE IS PRESUMED** to have authority to take them anywhere, and a risk taken by him outside his real jurisdiction is binding upon the company which he represents. *Hahn v. Guardian Ins. Co.*, 709.
6. **WAIVER OF PROOFS OF LOSS.**—The refusal by an insurance adjuster, with the approval of his company, to settle a loss, coupled with his declaration that it will not be paid, constitutes a waiver of preliminary proofs of loss. *Hahn v. Guardian Ins. Co.*, 709.
7. **WITHDRAWAL OF WAIVER OF PROOF OF LOSS.**—Although an insurance company has waived preliminary proofs of loss, it may in good faith withdraw such waiver within a reasonable time, and require proofs to be furnished as prescribed by the policy. It thereupon becomes the duty of the insured to furnish such proofs, provided he has ample time, and no undue advantage is sought to be taken of him. *Hahn v. Guardian Ins. Co.*, 709.
8. **REPRESENTATION AS TO GOOD HEALTH, EFFECT OF.**—If a benefit certificate is granted upon the express condition that the statements in the application therefor are true, but the applicant, while affirming himself to be in good health, also makes a general declaration as to the statements subscribed by him, that they are true to the best of his knowledge and belief, the effect of this qualification is that recovery upon the certificate can be defeated only by showing that he knew or had reason to believe that he was not in good health at the time the application was made. *Hann v. National Union*, 365.
9. **GOOD HEALTH, MEANING OF.**—The term good health, when used in an application for a policy of life insurance, means that the applicant has no grave, important, or serious disease, and is free from any ailment that seriously affects the general soundness and healthfulness of the system. A mere temporary indisposition which does not tend to weaken or undermine the constitution at the time of taking membership does not render a policy void. *Hann v. National Union*, 365.

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10. **CONCEALMENT OF WHAT FACTS WILL NOT AVOID POLICY.**—The failure of the applicant for a life insurance policy to disclose to the company the fact of his having consulted a physician on the same day that he applied for his policy is not such a concealment as will vitiate the contract, where the evidence shows his object in consulting the physician was merely to procure a prescription to relieve him from a slight disorder of the stomach, which soon passed away. *Hans v. National Union*, 363.
11. **ACCIDENT INSURANCE.—NOTICE OF DEATH OR OF ACCIDENT.**—Though a policy of insurance against accidental injury requires notice to be given in writing stating the full particulars of the accident and injury within ten days after injury or death, the failure to give such notice within the time specified does not absolve the insurer from liability if it was caused by the death of the party injured under such circumstances that it was not known until several days thereafter, and the notice was given within ten days after the discovery of his body and of the fact of his death. *Trippe v. Provident Fund Society*, 529.
12. **ACCIDENT INSURANCE, WAIVER OF NOTICE OF DEATH.**—If a notice of a death by accident is given at a later date than was stipulated in the policy, but is retained without objection and the insurer furnishes blank proofs of loss, and, on their being filled out and forwarded, also retains them without objection, and subsequently demands further information, which is furnished, the insurer waives the objection that the notice was not given in time. *Trippe v. Provident Fund Society*, 529.

See WITNESSES, 11.

INTEREST.

See NEGOTIABLE INSTRUMENTS, 14.

INTOXICATING LIQUORS.

1. **PLEADING—JOINDER OF COUNTS.**—A count for maintaining a nuisance under section 7 of the Illinois Dram Shop Act may be joined in an indictment with one or more counts charging illegal sales of liquor under section 2 of the same act. *Gitchell v. People*, 147.
2. **ILLEGAL SALES—INDICTMENT.**—In an indictment for the unlawful sale of intoxicating liquor it is sufficient to charge a sale simply, without stating the name of the person to whom sold, or that the name of such person is to the grand jurors unknown. *State v. Wingfield*, 406.
3. **ILLEGAL SALE UNDER LOCAL OPTION LAW.**—One indicted for selling intoxicating liquor in violation of a local option law in force in a certain county, by furnishing to others and forwarding to wholesalers in another county blank orders for liquor, directing it to be shipped in the care of the defendant, who received and delivered the liquor to the persons thus ordering it, who pay him therefor, is not guilty if the liquor is shipped to him as the agent of those who order it, or at their request; but if it is shipped to him as the agent of the wholesalers, only to be delivered to those ordering it on the payment of the purchase price, and any part of it is removed and payment made therefor to the defendant in the county where the local option law is in force, then both he and the wholesalers are guilty of a violation of the law. *State v. Wingfield*, 406.

See JOINT LIABILITY, 2.

INTOXICATION.

See CRIMINAL LAW, 2-6; HOMICIDE, 5, 6.

INVENTIONS.

See PATENTS, 1.

JOINDER.

See CORPORATIONS, 5; INTOXICATING LIQUORS, 1.

JOINT LIABILITY.

1. CONTRIBUTION BETWEEN WRONGDOERS.—In determining whether a right of contribution exists in favor of one wrongdoer against another, the test is, must the party demanding contribution be presumed to have known that the act for which he has been compelled to respond was wrongful? If so, he cannot recover. *Johnson v. Torpy*, 447.
2. CONTRIBUTION BETWEEN PERSONS LIABLE FOR WRONGFUL SALE OF INTOXICATING LIQUOR.—If two persons are licensed saloon keepers in the same town, and have given bonds as such, and a recovery is had against one of them and his sureties for causing the death of a human being by selling him such liquors, he cannot enforce contribution of the other saloon keeper and his sureties, on the ground that the last-named saloon keeper was guilty of contributing to such death by also selling liquor to the same person, if such person was a common drunkard, and each of the persons selling liquor to him must have known that their act was wrongful and unlawful. *Johnson v. Torpy*, 447.

See HUSBAND AND WIFE, 1-3.

JUDGMENT-ROLL.

See APPEAL, 2.

JUDGMENTS.

1. JURISDICTION.—A JUDGMENT UPON A DEFECTIVE COMPLAINT CANNOT BE COLLATERALLY attacked because of such defect. The action of the court in expressly or impliedly determining the complaint to be sufficient, and rendering judgment thereon in accordance with its prayer, can be nothing more than error. It is sufficient that the complaint informs the court and the defendant of the relief demanded and of the facts upon which the right to such relief is based. *In re James*, 60.
2. A JUDGMENT RECORD OF ANOTHER STATE MAY BE COLLATERALLY IMPEACHED by extrinsic evidence showing that the court pronouncing the judgment did not have jurisdiction, though the record recites the existence of the jurisdiction sought to be disproved. *In re James*, 60.
3. A JUDGMENT BASED UPON A SERVICE OF SUMMONS BY READING IT TO THE DEFENDANT when the law requires a copy to be given him, though reversible upon appeal, is not void. *Gandy v. Jolly*, 460.
4. PRACTICE.—In an action brought by attachment against the defendant in the county where he had resided, in which it is charged he has absconded, process may be served on him in any county in which he may be afterwards discovered, and a judgment secured upon such process cannot be disregarded as void. *Gandy v. Jolly*, 460.
5. WHEN BIDDING UPON A THIRD PERSON.—Where a party knows that an injury for which an action is brought against another was caused by himself, and that no recovery can be had therein, unless for his neglect

or wrong, he is bound by the judgment which may be entered in such action, if he had knowledge of its pendency and could have defended had he so desired. In a subsequent action against him by the judgment defendant the measure of damages is the amount of such judgment with interest and costs. *Missouri Pac. Ry. Co. v. Twiss*, 437.

6. **RES JUDICATA.**—**AFTER AN AWARD AGAINST A CITY**, made under and pursuant to the provisions of a statute, and confirmed by the judgment of a court of competent jurisdiction, such city is estopped from contending that such statute is unconstitutional and void because it authorized the auditing and payment of a claim for which the municipality was not answerable. *People v. Common Council*, 563.
 7. **RES JUDICATA.**—**A BILL FOR THE RESETTLEMENT OF THE ADMINISTRATION ACCOUNT** of a decedent must be denied if the same matters were at issue and determined in a previous suit between the same parties. *Gibson v. Green*, 888.
 8. **RES JUDICATA.**—That a former adjudication may constitute an absolute bar to a subsequent action there must be, as between the two actions, identity of persons, of subject matter, and of cause of action; but when some controlling fact or question, material to the determination of both actions, has been adjudicated in the former suit by a court of competent jurisdiction, and the same fact or question is again at issue between the same parties, its adjudication in the first action is, if properly presented, conclusive of the same question in the later suit, irrespective of whether the cause of action is the same in both suits or not. This doctrine is limited to matters involved in the litigation, but is equally applicable whether the point decided is, of itself, the ultimate vital point, or only incidental, if still necessary to the decision of that point. *Wright v. Griffey*, 228.
 9. **RES JUDICATA—PARTIES.**—The mere joining, in a second suit, of a nominal party who has no interest in the subject matter in litigation does not prevent a prior adjudication from being a bar. *Wright v. Griffey*, 228.
 10. **RES JUDICATA—PARTIES.**—A judgment in an action at law between two parties which necessarily adjudicates that certain corporation stock belongs to them jointly, but not to either severally, is a bar to a suit in equity by one to compel the other to assign the stock to him, on the ground that the former has no interest therein, but holds the legal title for the latter. *Wright v. Griffey*, 228.
 11. **RES JUDICATA—MATTERS ADJUDICATED, HOW FOUND.**—Ordinarily, the pleadings in a former suit when introduced in a second action will show what was within the issues and determined in the first suit, and a fact or question is no less at issue or within the conclusive effect of the first judgment because the averments of the declaration and traverse therein are general. The difference between cases where the issue is general and those wherein it is limited by the pleading to a single point, is, that the matter which appears by inspection of the record in the latter must in the former be established by evidence. Parol evidence of what occurred upon the former trial, and what was actually decided, is always admissible in such cases. *Wright v. Griffey*, 228.
 12. **AN ACTION LIES ON A DOMESTIC JUDGMENT** though it may also be enforceable by execution. *Eldredge v. Aultman*, 476.
- See** **APPEAL**, 1; **DOWER**, 2; **EMINENT DOMAIN**, 1, 2, 4; **EVIDENCE**, 6; **EXECUTION**, 1; **FORCIBLE ENTRY AND DETAINER**; **IMPRISONMENT**; **JURISDICTION**, 2, 3; **LANDLORD AND TENANT**, 15; **MERGER**; **MORTGAGES**, 4-6; **MUNICIPAL CORPORATIONS**, 15, 18; **STATUTES**, 20; **SURETSHIP**, 1.

JUDICIAL NOTICE.

See EVIDENCE, 11; LEGISLATURE, 1; LIBEL, 5; STATUTES, 1.

JUDICIAL SALES.

1. **VACATING FOR MISREPRESENTATION OF OFFICERS.**—The fact that the sheriff and clerk of the court represented that a purchaser of land which the former was offering for sale under a judgment would obtain a perfect title, and thereby induced a purchaser to bid, does not entitle him to have the sale set aside, on proof that the land was subject to a paramount lien, and that he and they were mistaken in believing that the sale would cut out such lien, when none of the parties to the action united in, or knew of, such representation. It was the duty of the purchaser to ascertain for himself the character of the title he was about to acquire, and he had no right to rely upon the statements of the clerk and the sheriff, especially when an examination of the proceedings in the case would have disclosed the true condition of the title. *Norton v. Nebraska Loan etc. Co.*, 441.
2. **AFTER A BID IS ACCEPTED**, an officer making a judicial sale has no power to release the bidder. *Norton v. Nebraska Loan etc. Co.*, 441.
3. **DEPRESSING BIDS.**—Any statement made by a purchaser at a judicial sale that she is a widow, dependent on the premises for support, and wishes no one to bid against her, though true, requires the vacating of the sale, if it prevents other persons from bidding. *Herndon v. Gibson*, 765.

See CORPORATIONS, 21, 22.

JURISDICTION.

1. **JURISDICTION OVER SUBJECT MATTER.**—The courts of the state of New York have jurisdiction of an action commenced therein to recover damages sustained from a trespass upon real property, situate in another state, when the defendant does not object to the exercise of such jurisdiction, and the plaintiff has waived his objection by instituting the action. *Sentinis v. Ladew*, 569.
2. **DEFECT IN OBTAINING.**—THERE IS A CLEAR DISTINCTION BETWEEN an entire want of jurisdiction and an irregularity in some one of the steps taken to obtain it. If the statute concerning constructive service of process upon nonresidents in suits for divorce authorizes an order to be made by the clerk of the court in vacation, and to be published as in such statute designated, the fact that the clerk fails to sign the order, which he makes and enters in the proper book in his office, is a mere irregularity, and a judgment based upon due publication of such order is valid. *In re James*, 60.
3. **JUDGMENT OF COURT OF SISTER STATE.**—IF THERE IS A SUBSTANTIAL CONFLICT OF EVIDENCE as to the facts necessary to sustain the jurisdiction of a court of another state to pronounce the judgment relied upon, the implied finding of the trial court in favor of such jurisdiction and the facts necessary to support it, will not be reviewed upon appeal. *In re James*, 60.

See JUDGMENTS, 2; PROHIBITION, 2; TRIAL, 4.

JURY AND JURORS

See TRIAL.

KNOWLEDGE.
See INSURANCE, 1-3.

LAOCHES.
See EQUITY, 2.

LANDLORD AND TENANT.

1. **EASEMENT OF LIGHT, GRANT OF, CONSTRUED.**—Where a lease contains a provision to the effect that the lessor "shall not build at the rear of the demised premises nearer than twenty-five feet," and that "no obstruction higher than six feet shall be placed in such manner as to obstruct light to said premises," and also refers to "a space in the yard at the rear," as a part of those premises, the true meaning of the words is, that no obstruction of the height specified shall be so placed on any side of the premises as to obstruct the passage of light to the said premises, and not merely that no such obstruction shall be placed in the rear of the premises. Hence in an action for the rent of those premises, in which the lessee seeks to recoup damages for the lessor's breach of the covenants in the lease, the lessee is entitled to prove, if he can, that a building erected by the lessor not to the rear, but alongside, of the leased premises is so placed as to obstruct the passage of light to any part thereof, including the space in the yard. *Keating v. Springer*, 175.
2. **RE-ENTRY OF LANDLORD, WHEN TERMINATES LEASE AND RENT.**—If a lease stipulates that for any breach of covenant the lease shall determine and be utterly void at the election of the lessor, an entry by the landlord is an exercise of his option to determine the lease, and he cannot recover for subsequent rent. *Grommes v. St. Paul Trust Co.*, 248.
3. **WHAT AMOUNTS TO EVICTION BY LANDLORD.**—In order to constitute an eviction, it is not necessary that there should be an actual physical expulsion. Acts of a grave and permanent character, which amount to a clear indication of intention on the landlord's part to deprive the tenant of the enjoyment of the demised premises, amount to an eviction. *Keating v. Springer*, 175.
4. **EVICTION—WHAT CONSTITUTES.**—Acts by a landlord in interference with his tenant's possession, to constitute an eviction, must clearly indicate an intention that the tenant shall no longer continue to hold the premises. *Grommes v. St. Paul Trust Co.*, 248.
5. **EFFECT OF EVICTION ON RENT.**—Eviction by the landlord relieves the tenant from the payment of rent accruing after his possession ceases, but rent already accrued and overdue is not forfeited thereby. *Grommes v. St. Paul Trust Co.*, 248.
6. **ASSIGNMENT OF LEASE AS DISCHARGE OF TENANT AND HIS SURETIES.**—An assignment of a lease by the lessee does not discharge him or his sureties from the covenants contained therein even when the landlord recognizes the assignment by accepting rent from the assignee. *Grommes v. St. Paul Trust Co.*, 248.
7. **ACCEPTANCE OF RENT FROM ASSIGNEE OF LEASE AS DISCHARGE OF TENANT.**—If there is an express covenant to pay rent for a term of years, the mere acceptance of rent from the assignee of the tenant does not discharge the latter unless the landlord enters into such stipulations with the assignee as to accept him as sole tenant and absolve the original tenant, and in the absence of such substitution and a clear intent to enter into such new contract, both the original tenant and his assignee will be

liable to the landlord for the rent stipulated for in the lease. *Grommes v. St. Paul Trust Co.*, 248.

8. **LIABILITY OF ASSIGNEE FOR RENT AS DISCHARGE OF TENANT.**—The assignee of a leasehold estate is liable for the rent according to the terms of the lease, but the fact of his liability after the assignment does not discharge the original tenant or his sureties from his covenant to pay rent, and in case the rent is not paid by the assignee as it becomes due, an action may be maintained against such tenant therefor; and it makes no difference in this respect that the landlord may have received rent from the assignee and accepted him as a tenant. *Grommes v. St. Paul Trust Co.*, 248.
9. **ASSIGNMENT OF LEASE AS DISCHARGE OF TENANT.**—An assignment of the lease or a subletting of the premises by the tenant, with the written consent of the landlord, will not discharge the tenant or his sureties from liability to pay rent when such assignment or subletting is authorized by the lease. *Grommes v. St. Paul Trust Co.*, 248.
10. **TENANT'S RIGHT TO ABANDON, WHEN DEEMED WAIVED.**—If the tenant makes no surrender of the possession of the demised premises, but continues to occupy them after the commission of acts on the landlord's part which would have justified him in abandoning them, he will be deemed to have waived his right to abandon; nor, in such case, can he sustain a plea of eviction by showing that there were circumstances which would have justified him in leaving the premises. *Keating v. Springer*, 175.
11. **RE-ENTRY BY LANDLORD, WHEN DOES NOT TERMINATE RENT.**—If a lease provides that a re-entry and taking possession by the landlord shall not have the effect of determining the lease, nor operate to prevent its continuing in force, such re-entry for the nonpayment of rent does not relieve the tenant from the payment of rent subsequently accruing the end of the term. *Grommes v. St. Paul Trust Co.*, 248.
12. **RE-ENTRY BY LANDLORD—DISPOSITION OF RENTS SUBSEQUENTLY COLLECTED.**—A provision in a lease against a forfeiture, by the re-entry of the landlord, of the rent to be paid during the whole term, does not authorize the landlord to collect the subsequent rent after such re-entry both from the tenant named in the lease and also from any tenant to whom the lessor may re-let, but the rent due from the original tenant is to be credited with such rent as is realized from the re-letting. The landlord is entitled to such sum as shall be equal to the rent required by the terms of the lease to be paid during the whole term, and not to any greater sum. *Grommes v. St. Paul Trust Co.*, 248.
13. **LANDLORD'S RIGHT TO RENT NOT FORFEITED BY WRONGFUL ACT.**—The wrongful act of the landlord does not debar him from a recovery of rent, unless the tenant by such act has been deprived in whole, or in part, of the possession, either actually or constructively, or the premises rendered useless. *Keating v. Springer*, 175.
14. **AGREEMENT TO PAY RENT AFTER RE-ENTRY BY LANDLORD—VALIDITY.** An agreement in a lease by the tenant and his sureties that the obligation of the tenant to pay all the rent to the end of the term shall remain, notwithstanding a re-entry for default in the payment of rent, is valid, and may be enforced against them as to rent subsequently accruing after such default and re-entry, no matter whether it is called rent or damages for a breach of covenant. *Grommes v. St. Paul Trust Co.*, 248.

15. **RIGHT AND MODE OF RE-ENTRY BY LANDLORD.**—When a lease authorizes the landlord to re-enter in case of default in the payment of rent, the fact that he re-enters after establishing his right to do so by action of forcible entry and detainer, instead of making a re-entry without obtaining a judgment of restitution, cannot be complained of by the tenant or his sureties. *Grommes v. St. Paul Trust Co.*, 248.
 16. **ESTOPPEL OF LANDLORD TO DENY SURRENDER.**—When it is mutually agreed between parties that a lease shall be surrendered, and a new one is thereupon made with another party, and the landlord accepts the new party as his tenant, this will estop the landlord thereafter from denying the surrender of the first lease. *Grommes v. St. Paul Trust Co.*, 248.
 17. **DEFENSES BY TENANT'S SURETY AGAINST ACTION FOR RENT.**—A surety for a tenant may set up, in defense to an action against him for rent, any matter that operates as a discharge of the tenant from liability upon the lease; but the landlord must create a new tenancy by agreeing to accept the subtenant or assignee of the lease as his tenant, and by accepting him in substitution for the original tenant before the latter or his sureties will be discharged. *Grommes v. St. Paul Trust Co.*, 248.
 18. **RECOUPMENT OF DAMAGES IN ACTION FOR RENT.**—Where a lessee has remained in possession of the demised premises after the lessor has so acted that he would be justified in leaving them, and has thus forfeited his right to plead eviction as a bar to an action for the recovery of rent, he may nevertheless, in such an action, recoup against the rent claimed such damages as he may have sustained by reason of the landlord's breach of the covenants in the lease. *Keating v. Springer*, 175.
- See DAMAGES, 3, 4; FORCIBLE ENTRY AND DETAINER; WITNESSES, 2.

LEASE.

See CORPORATIONS, 6; LANDLORD AND TENANT.

LEGACY.

1. **LEGACY UPON CONDITION, HOW CONSTRUED.**—Where it is doubtful whether words of condition or contingency apply to the gift itself or to the time of payment, they will be construed as applying to the latter. *Ducker v. Burnham*, 135.
2. **WHEN VESTED OR CONTINGENT.**—The general rule is that where there is no gift but by a direction to divide, or transfer, or pay, from and after a given event, the vesting must be postponed until after the event has happened, unless from particular circumstances a contrary intention is to be collected, or unless the payment, distribution, or division is postponed merely for the convenience of the fund or property, as, for instance, to let in a prior gift for life to another. *Ducker v. Burnham*, 135.
3. **LEGACIES, WHEN VESTED AND WHEN CONTINGENT.**—A legacy is of the vested kind if the time of payment merely is postponed, and it appears to be the intention of the testator that his bounty should immediately attach; but if the time be annexed to the substance of the gift as a condition precedent, it is contingent, and not transmissible. *Ducker v. Burnham*, 135.

LEGISLATURE.

1. **CONSTITUTIONAL LAW.**—THE INHIBITION IN THE CONSTITUTION AGAINST THE ENACTMENT OF ANY LAW MAKING A GIFT, or authorizing the making of

a gift, of any public money or thing of value to any individual, municipal or other corporation whatever, should not receive a strict and narrow construction, but its spirit, as well as its language, should be followed, and in determining whether a statute violates the prohibition, the provisions of the statute, as well as those matters of which the court can take judicial knowledge, must be considered. *Conlin v. Board of Supervisors*, 17.

2. **CONSTITUTIONAL LAW.—THE GIFTS WHICH ARE FORBIDDEN** by the constitution of California include all appropriations of public money for which there is no authority or enforceable claim, or which rest in some moral or equitable obligation, which in the mind of a generous, or even a just, individual, dealing with his own moneys, might prompt him to recognize as worthy of some reward. Public moneys must be regarded as held for public purposes, and the legislature is forbidden to dispose of them except for such purposes. *Conlin v. Board of Supervisors*, 17.
3. **CONSTITUTIONAL LAW—FORBIDDEN GIFTS.**—An appropriation of money by the legislature for the relief of one who has no legal claim therefor must be regarded as a gift within the meaning of that term as used in the constitution of California; and it is none the less a gift that a sufficient motive appears for the appropriation, if the motive does not rest upon a valid consideration. *Conlin v. Board of Supervisors*, 17.
4. **CONSTITUTIONAL LAW—GIFTS—ACT FOR THE RELIEF OF A STREET CONTRACTOR.**—If a street contractor has done work for which he is unable to obtain compensation because of errors and irregularities of the municipal officers, and under a statute which requires every contract for street work to contain a condition, that in no event will the municipality be liable therefor, an act which directs such municipality to pay him a specified sum for such work is a gift, and is invalid under a constitution forbidding the legislature to make gifts of public money. *Conlin v. Board of Supervisors*, 17.
5. **MUNICIPAL CORPORATIONS.—THE AUTHORITY OF THE LEGISLATURE OF THE STATE TO DIRECT A MUNICIPALITY TO MAKE ANY PAYMENT** out of its funds rests upon the proposition that such funds are public moneys acquired under the authority of the state for public purposes. *Conlin v. Board of Supervisors*, 17.

See CONSTITUTIONS, 2; CONTEMPT, 1; CORPORATIONS, 11; MUNICIPAL CORPORATIONS, 2; STATUTES.

LEX LOCI.

See CONTRACTS, 1, 2.

LIBEL.

1. **NEWSPAPER LIBEL.**—A NEWSPAPER PROPRIETOR IS LIABLE for what he publishes in the same manner as any other individual, and can defend an action for libel, or mitigate damages to be recovered therefor upon precisely the same ground as any other individual could defend an action for slander in uttering the same words upon the street. *Edwards v. San Jose Printing Society*, 70.
2. **MITIGATION OF DAMAGES BY PROOF OF GOOD FAITH.**—THE MERE BELIEF of an editor in the justice and truth of an attack made by him upon the private character of a citizen is not a defense to an action by him for libel, nor can such belief be considered in mitigation of damages unless it appears to have been based upon information derived from a

- reliable source. It must be shown that the charge was made after due investigation of the matter to which it related. *Edwards v. San Jose Printing Society*, 70.
3. BEFORE DEFENDANT CAN MITIGATE DAMAGES by proving that the statement published by him was received from other persons, he must give the source of his information, and show that his informants were possessed of such character and standing as would command a belief in the truth of their utterances. *Edwards v. San Jose Printing Society*, 70.
 4. PLEADING.—IF A LIBEL OR SLANDER IS EXPRESSED IN LANGUAGE HAVING A COVERT MEANING not apparent on its face, or in words and phrases not used otherwise than as slang or cant terms, it is necessary for the plaintiff to allege and prove the sense in which the words were used and understood by those to whom they were addressed. *Edwards v. San Jose Printing Society*, 70.
 5. PLEADING.—A complaint in an action for libel alleging that the defendants published of plaintiff that he was to have "charge of the sack" at an approaching election need not contain any allegation of the signification of the word "sack" as so used. The court will take judicial notice that it meant, in the connection in which it was employed, a fund to be used for corrupting voters. *Edwards v. San Jose Printing Society*, 70.
 6. TO ACCUSE ONE OF "HAVING CHARGE OF THE SACK" for an election about to be held is equivalent to charging him with having charge of a fund to be used for the purpose of corrupting voters, and is libelous. *Edwards v. San Jose Printing Society*, 70.
 7. EVIDENCE OF ACTS OF PLAINTIFF PRIOR TO THE PUBLICATION OF THE LIBEL, of a similar nature to those of which he was accused in such publication, is not admissible without first proving, or offering to prove, that the defendant had knowledge of such acts prior to such publication. *Edwards v. San Jose Printing Society*, 70.
 8. NOMINAL DAMAGES.—AN INSTRUCTION THAT THE JURY SHOULD GIVE NOMINAL DAMAGES ONLY, if the reputation of the plaintiff was, prior to the libelous publication, bad with respect to the matters of which he was accused, should be refused, because the verdict of a jury cannot be restricted to nominal damages unless they believe that such damages will compensate plaintiff for the wrong suffered by such publication, and that exemplary damages should not be given. *Edwards v. San Jose Printing Society*, 70.

LICENSE

See MUNICIPAL CORPORATIONS, 7; PATENTS.

LIENS.

See CARRIERS, 6, 7; CHATTEL MORTGAGES, 1; DOWER; MORTGAGES, 3; SUBROGATION, 5.

LIFE TENANTS.

See ESTATES; WILLS, 4.

LIMITATIONS OF ACTIONS.

1. STATUTE OF LIMITATIONS TO BE AVAILED OF MUST BE PLEADED. *Gibson v. Green*, 888.

2. **FORMAL PLEA OF THE STATUTE, WHEN NOT NECESSARY.**—The statute of limitations is available as a defense without a formal plea thereof, if the nature of the proceeding is such that the statute cannot be interposed directly as a bar to the plaintiff's right of action, and is relied upon merely as precluding the plaintiff from assailing, on the ground of fraud, an instrument offered in evidence by the defendant. *Jackson v. Plyler*, 782.
 3. **LIMITATIONS OF ACTIONS FOR RELIEF ON THE GROUND OF FRAUD, WHEN INAPPLICABLE.**—A statute limiting the period within which "actions for relief on the ground of fraud" must be commenced will not preclude a mortgagee from showing, in a foreclosure suit instituted after the lapse of that period, that a prior deed under which the defendant seeks to make title was fraudulent as to the subsequent creditors of the grantor. *Jackson v. Plyler*, 782.
- See **ADVERSE POSSESSION**, 4, 5; **CORPORATIONS**, 10, 11; **EJECTMENT**; **FORGERY**, 2; **MUNICIPAL CORPORATIONS**, 20; **TRUSTS**, 6.

LIQUORS.

See **INTOXICATING LIQUORS**.

LIVESTOCK.

See **CARRIERS**, 8, 9.

LOCAL OPTION LAW.

See **INTOXICATING LIQUORS**, 2.

MALICE.

See **ASSAULT**, 1; **HOMICIDE**, 3, 7; **REAL PROPERTY**, 8.

MANDAMUS.

1. **MANDAMUS AGAINST CORPORATIONS TO COMPEL PERFORMANCE OF PUBLIC DUTIES.**—*Mandamus* lies to compel a street railroad company to perform the duty which it owes to the public to operate its road in accordance with the provisions of an ordinance under which the road was constructed. *City of Potwin Place v. Topeka Ry. Co.*, 312.
2. **MANDAMUS TO COMPEL THE PERFORMANCE OF A PUBLIC DUTY—DISCRETION OF COURT.**—The granting of a writ of *mandamus* to compel the performance of a public duty rests largely in the discretion of the court, and the writ should be so framed as to best preserve and enforce the rights of all parties. *City of Potwin Place v. Topeka Ry. Co.*, 312.

See **STATUTES**, 5.

MANDATORY.

See **STATUTES**, 19.

MANSLAUGHTER.

See **HOMICIDE**, 4, 9, 10.

MANUFACTURING.

See **CONTRACTS**, 4, 5; **PERSONAL PROPERTY**.

MARRIAGE AND DIVORCE.

See INCEST, 3-6; SEDUCTION, 2-5.

MARRIAGE AND DIVORCE.

1. A DECREE OF DIVORCE REGULARLY OBTAINED IN ONE STATE BY A CITIZEN THEREOF against a nonresident, constructively served with process in the action and without other notice, and which is valid in the state where rendered, is equally valid in a sister state. *In re James*, 60.
2. DIVORCE FROM BED AND BOARD, EFFECT UPON PARTY ALREADY DIVORCED. If after a divorce has been granted to a husband, he returns to the state where his former wife is, and is there sued by her for a divorce from bed and board, and a judgment is entered in her favor without his interposing his divorce by a plea in bar or otherwise, this second divorce does not invalidate the first, nor change his status of a married man established by his divorce, and therefore in a contest between his wife and a woman married to him after the entry of both decrees of divorce, his first divorce is still operative and sustains the second marriage. *In re James*, 60.
3. MARRIAGE, EVIDENCE OF.—The fact that a woman assumes a certain name, and gives her child that name, is no proof of her marriage with a man who bears that name. *Simon v. State*, 802.
4. MARRIAGE, VALIDITY OF.—Whatever be the form of ceremony, or if there be no ceremony, and the parties, if capable of consent, agree presently to take each other for husband and wife, and from that time live professedly in that relation, these facts are sufficient to constitute proof of a marriage binding on the parties, and subjecting them to legal penalties for a disregard of its obligations. *Simon v. State*, 802.

MARRIED WOMEN.

See ADVERSE POSSESSION, 1-3; HUSBAND AND WIFE.

MASTER AND SERVANT.

1. A MASTER IS NOT RESPONSIBLE FOR THE CONSEQUENCES OF BAD ADVICE GIVEN BY A SERVANT whose duties do not include the giving of advice and counsel generally, and the advice given relates to the conduct of another not connected with or relating to the business in which the servant is at the time engaged. *Keating v. Michigan Cent. R. R. Co.*, 328.
2. ASSUMPTION OF RISKS.—Where the material question in an action by an employee to recover damages for personal injuries received in the course of his employment is, whether he has assumed the risk of the particular peril which has caused his injuries, and the defendant has requested the court to charge the jury that "where an employment is attended with danger, a servant engaging in it assumes hazard of ordinary perils which are incident to it, and if he receives an injury from an accident which is an ordinary peril of the service undertaken by him he cannot recover damages for the injury," it is proper before giving such instruction to modify it by the addition of the clause, "but this applies only to perils or risks ordinarily incident to the service, and not to those which are extraordinary, and which did not exist at the time the servant engaged in the master's business, and which the serv-

ant did not subsequently assume." Without such modification the instruction asked for can have no application to the supposed facts, except upon the assumption that the particular peril in question was one of the ordinary perils incident to the service, and it is therefore misleading unless the rule which should govern in case that peril is decided not to be an ordinary one is also given to the jury. *Libby v. Scherman*, 191.

2. **ASSUMPTION OF RISKS—AN EMPLOYEE MAY CONTRACT TO USE DEFECTIVE MACHINERY**, and where he knows of the defect, and uses the machinery voluntarily, the law warrants the inference that he assumes the incident risks. *Ragon v. Toledo etc. Ry. Co.*, 336.
4. **ASSUMPTION OF RISKS, LIMITS OF DOCTRINE AS TO.**—The doctrine that a servant's want of knowledge of a defect in the appliances furnished by the master precludes the inference of an assumption of risks and makes the master liable does not justify carelessness on the part of the servant. The master has a right to expect him to be alert to inform himself of existing conditions, and he cannot attack the master from the shelter of unjustifiable ignorance of the business, machinery, and methods which he is employed to use. *Ragon v. Toledo etc. Ry. Co.*, 336.
5. **LIMIT TO SERVANTS' RIGHT OF RECOVERY FOR INJURIES CAUSED BY DEFECTIVE APPLIANCES.**—Obvious imperfections in methods or machinery, existing at the time of the employment, cannot be made the basis of a liability in favor of an employee who suffers an injury in the course of his employment, for the reason that the employer has a right to have and use imperfect methods and tools, and to ask others to enter his employ to aid him in such use. *Ragon v. Toledo etc. Ry. Co.*, 336.
6. **DUTY OF MASTER TO PROVIDE SAFE PLACE FOR WORK.**—When the declaration in an action by the defendant's servant to recover damages for personal injuries caused by the fall of a row of barrels near which the plaintiff was working avers in substance that it was the defendant's duty to maintain that row in such a condition that the barrels would not fall, and that the defendant so carelessly maintained the said row of barrels that they spread, tilted, and fell upon the plaintiff, the gist of the action is the failure of the defendant to discharge the duty incumbent upon every employer to furnish his employee with a reasonably safe place in which to work, and therefore the defendant cannot complain of an instruction which states that duty correctly, on the ground that it is not applicable to any issue in the case. *Libby v. Scherman*, 191.
7. **INDEPENDENT CONTRACTOR, LIABILITY FOR ACTS OF.**—When work to be performed is necessarily dangerous, and an obligation rests on the employer to keep the place of the work in a safe condition, he is answerable for injury resulting from the dangerous condition in which the work is left, though it is being done for him by an independent contractor. *Omaha v. Jensen*, 432.
8. **VICE-PRINCIPAL, WHO IS.**—One who has charge of other servants, and has authority to govern and direct their movements in the branch of the principal's business in which they are engaged in, while acting in pursuance of and within the scope of such authority, the vice-principal, so as to make his acts and directions the acts and directions of the principal. *Libby v. Scherman*, 191.

See **CORPORATIONS**, 26; **HUSBAND AND WIFE**, 2, 3; **RAILROADS**, 22-23; **STATUTES**, 4.

MERGER.

JUDGMENT.—THE RECOVERY OF JUDGMENT ON A DEBT SECURED BY A TRUST DEED does not merge such debt so that it is no longer secured by the deed. *Gibson v. Green*, 883.

MINES AND MINING.

See CORPORATIONS, 19; DAMAGES, 2; WATERS; WITNESSES, 9, 10.

MINORS.

See INFANTS.

MISREPRESENTATIONS.

See JUDICIAL SALES, 1; MISTAKE, 1; NEGOTIABLE INSTRUMENTS, 2.

MISTAKE.

1. **CONTRACT.**—A PARTY TO A CONTRACT CANNOT AVOID it on the ground that he made a mistake where there had been no misrepresentation, and there is no ambiguity in the terms of the contract, and the other contractor has no notice of such mistake, and acts in perfect good faith. A unilateral error does not avoid a contract. *Borden v. Richmond etc. Ry. Co.*, 632.
2. **CONTRACT.**—THE MISTAKE OF THE AGENT OF A RAILWAY CORPORATION in contracting to carry cotton at a price specified, caused by a telegram from his superior officer being incorrectly transmitted, does not entitle his principal to be released from the contract, nor from paying damages resulting from its breach. *Borden v. Richmond etc. Ry. Co.*, 632.

See EVIDENCE, 7.

MORTGAGES.

1. **ADVERSE POSSESSION BY MORTGAGEE PASSES TITLE, WHEN.** The grantee under a deed, absolute in form but intended as a mortgage, who has held the land conveyed adversely to his grantor for the statutory period, acquires a perfect title thereto. To such a case section 3284 of the Civil Practice Act of Nevada, which provides that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale," has no application. *Borden v. Olson*, 511.
2. **MORTGAGE FOR PURCHASE MONEY—PRIORITY.**—A mortgage given by a purchaser in possession of land under a bond for title to one who advances the purchase money due, under an agreement between the parties that the purchaser is to give the party making the advances a mortgage upon the land upon receiving a conveyance thereof from the vendor, is entitled to priority in equity over a prior mortgage executed by the purchaser to a third person. *Demster v. Wilcox*, 422.
2. **VENDOR'S LIEN—PRIORITIES.**—If one person advances money to pay the unpaid purchase money for land at the request of the purchaser, under an agreement with him that he is to have a mortgage on the land to secure his purchase money, the mortgage to be executed as soon as the money is paid and a deed executed by the vendor, and in pursuance of this agreement the money is paid, the deed made, and the mortgage executed and delivered to the party advancing the money, then it all

becomes one transaction, and the mortgage thus given will take precedence of all other liens or encumbrances on the land of the mortgagor. *Demeter v. Wilcox*, 422.

4. JUDGMENT IN A SUIT TO FORECLOSE A MORTGAGE, BASED UPON CONSTRUCTIVE SERVICE OF PROCESS UPON A NONRESIDENT defendant, is valid, in so far as it directs a sale of the property and the application of the proceeds to the payment of the mortgage debt, but cannot authorize the docketing of a personal judgment against him for the amount of any deficiency. *Blumberg v. Birch*, 67.
 5. JUDGMENT FORECLOSING A MORTGAGE—ACTION AGAINST DEFENDANT FOR DEFICIENCY.—If a judgment has been entered against a nonresident foreclosing a mortgage, such judgment being based upon the constructive service of process, and the sale of the mortgaged premises, as directed by the judgment, an action may be maintained against the defendant to recover the amount of a deficiency remaining after such sale, though the judgment was not a valid personal judgment, yet a part of the debt remains unpaid and constitutes an enforceable cause of action, and a complaint alleging all the facts is not subject to demurrer. *Blumberg v. Birch*, 67.
 6. JUDGMENT OF FORECLOSURE, ACTION UPON.—An action can be maintained to enforce a judgment for the foreclosure of a mortgage. The plaintiff's remedy is not restricted to taking out an execution and selling the property under the original judgment. *Ross v. Blake*, 45.
- See ADVERSE POSSESSION, 4, 5; CHATTEL MORTGAGES; CURTESY, 2; LIMITATIONS OF ACTIONS, 3; SUBROGATION, 4.

MULTIPLICITY OF SUITS.

See INJUNCTION, 3, 4.

MUNICIPAL CORPORATIONS.

1. PUBLIC STREETS.—THE PRESUMPTION as to public streets is that the city has an easement only, and that the fee thereof is vested in the abutting owner. *White v. Northwestern etc. Ry. Co.*, 639.
2. PUBLIC STREETS.—AN ABUTTING OWNER, WHETHER THE FEE IS IN HIM OR IN THE MUNICIPALITY, has certain proprietary rights of which he cannot be deprived, even under authority of the legislature, without compensation. If the enjoyment of his private rights in the streets is impaired by the perversion of the street to uses for which it was not intended, and which the public right does not justify, and his property is thereby injured and its value impaired, he may maintain an action to recover such damages as he may have suffered. *White v. Northwestern etc. Ry. Co.*, 639.
3. PUBLIC STREETS.—AN ABUTTING OWNER of lands fronting upon a public street is entitled to every right and advantage in that part of the street in which he owns the fee, not required by the public. The easement of the public is the right to use and improve the street for the purposes of a highway only. *White v. Northwestern etc. Ry. Co.*, 639.
4. EMINENT DOMAIN—INSUFFICIENCY OF ORDINANCE TO AUTHORIZE CONDEMNATION.—An ordinance for the opening of a street which fails to state the nature or character of the improvement proposed to be made on the street when opened, and which also fails to give any basis or data from which an estimate of the cost of the improvement can be made in accordance with the statute, to be apportioned among or upon the prop-

erty benefited, is fatally defective, and no special assessment provided for therein can be made thereunder to pay the cost of such improvement. *Washington Ice Co. v. Chicago*, 222.

5. **STREETS—LICENSES TO OBSTRUCT.**—Municipal authorities have power to authorize and render lawful obstructions and erections in the streets for a public purpose which would otherwise be deemed nuisances, on the ground that this is merely putting the street to a new and improved use as demanded by the necessities of the times, and modern conveniences and appliances. *Savage v. Salem*, 685.
6. **STREETS, POWER OF MUNICIPALITY TO AUTHORIZE OBSTRUCTIONS IN.**—A municipal corporation has no power to authorize private persons or corporations to erect or maintain permanent obstructions in the public streets for purely private purposes; but it may authorize such obstructions for the purpose of serving the public for private gain, and in such case, although such structures may in fact be or become a public nuisance, and liable to abatement as such, they cannot be held to be a nuisance *per se*. *Savage v. Salem*, 688.
7. **STREETS, LICENSES TO USE—REVOCATION—NUISANCES.**—After a municipality has granted a license or franchise to a person or corporation to occupy a portion of the street for a public purpose, such as the erection of water-tanks for street sprinkling, and the licensee has acted upon such grant, and expended money on the faith thereof, the city cannot revoke the grant without compensation to the owner, unless the structure so erected and so authorized is, or has become by subsequent use, an actual nuisance, and this is a question exclusively for the jury to determine. *Savage v. Salem*, 688.
8. **LIABILITY OF FOR CONDITION OF STREETS.**—Notice to a municipality of the condition of a street is not a condition precedent to its liability to a person injured thereby when such condition necessarily resulted from work which the city had employed a contractor to do, though he had agreed to maintain proper guards and signals, and had failed to do so, and thereby caused an accident. Thus, if a city causes a cistern to be dug in a street, which is left open and unguarded, it cannot exonerate itself from liability by proving that the person employed to do such digging had agreed to keep guards and signals at the excavation. A city cannot surrender its control over its streets so as to relieve itself from liability. *Omaha v. Jensen*, 432.
9. **TOWNS—NOTICE OF DEFECT IN BRIDGE, EVIDENCE ADMISSIBLE TO SHOW.** A charge that proximity of residence on the part of the highway commissioner is a circumstance tending to show notice of a defect in a town bridge is unobjectionable. *La Duke v. Township of Exeter*, 357.
10. **VALIDITY OF ORDINANCES—POLICE POWER.**—The validity of an ordinance requiring the owner of a lot, which has been declared to be dangerous to the public health, to fill it up to a certain level at his own expense, and in the event of his refusing or neglecting to obey the direction, empowering the city to do the work and recover the expense thereof from him, if it does not amount to more than one-half the value of the lot, is to be determined by the principles by which the lawfulness of the exercise of the police power is tested, and not by those which are applicable to local taxes levied for the purpose of making improvements. *Charleston v. Werner*, 776.
11. **POWER TO REGULATE ERECTION OF BILLBOARDS.**—A city may prohibit the erection of insecure billboards or other structures, and require the

owners of those erected to maintain them in a secure and safe condition, and may provide for their removal at the expense of the owner in case they become dangerous to the public or to individuals. *Crawford v. Topeka*, 323.

12. PROHIBITION BY OF BILLBOARDS, ETC.—An ordinance providing that "no person shall erect any billboard or other structure for advertising purposes unless the same is placed at such distance from the line of any street or sidewalk as shall exceed at least five feet the height of such billboard or structure," and prescribing a punishment for its violation, is unreasonable and void. *Crawford v. Topeka*, 323.
13. ASSESSMENT OF PUBLIC PROPERTY FOR LOCAL IMPROVEMENT.—Constitutional and statutory enactments merely exempting state, county, and municipal property from taxation, do not necessarily exempt it from special local assessments. A courthouse square is not exempt from assessment for local street improvement. *City of Clinton v. Henry County*, 415.
14. ASSESSMENT OF PUBLIC PROPERTY FOR LOCAL IMPROVEMENT—STATUTORY REMEDY.—If a statute creates a new right and prescribes a remedy, the statutory remedy is exclusive. This rule applies to the collection of local assessments on public property for street improvement. *City of Clinton v. Henry County*, 415.
15. ASSESSMENT OF PUBLIC PROPERTY FOR LOCAL IMPROVEMENT—CONSTRUCTION OF STATUTE.—General language in a statute giving to cities power to levy local assessments for street improvement is not sufficient to embrace the property of the state or of a county which is devoted to strictly public uses, nor authorize the enforcement of such special assessment against it under a general judgment against the county. *City of Clinton v. Henry County*, 415.
16. ASSESSMENTS AGAINST PUBLIC PROPERTY FOR LOCAL IMPROVEMENTS ARE INVALID and cannot be enforced except by virtue of express statutory enactment or necessary implication. *City of Clinton v. Henry County*, 415.
17. ASSESSMENT OF PUBLIC PROPERTY FOR LOCAL IMPROVEMENT.—Property devoted to strictly public purposes may by statute be made liable for local improvement assessments, and the statute may also provide for the payment of such assessment out of the public treasury. *City of Clinton v. Henry County*, 415.
18. ASSESSMENT OF PUBLIC PROPERTY FOR LOCAL IMPROVEMENT.—PAYMENT OF a tax assessed against a public courthouse property for a street improvement made in the courthouse square cannot be enforced by general judgment against the county. *City of Clinton v. Henry County*, 415.
19. ASSESSMENT OF PUBLIC PROPERTY FOR LOCAL IMPROVEMENT.—PROCEEDINGS TO ENFORCE special assessments on public property for a local improvement are in the nature of proceedings *in rem*, and compulsory payment of the judgment can only be by a sale of the assessed property; and as such property cannot be sold under execution, the lien cannot be enforced against it unless a specific remedy is provided by statute. *City of Clinton v. Henry County*, 415.
20. CONSTITUTIONAL LAW—THE OBLIGATIONS OF A MUNICIPAL CORPORATION CANNOT BE IMPAIRED by restricting its power of taxation to the point of disabling it from performance or by a repeal of the law under which the obligation was to be enforced, or by enacting statutes of limitations that do not allow a reasonable time for bringing an action. *People v. Common Council*, 563.

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20. **CONSTITUTIONAL LAW—THE OBLIGATIONS OF A MUNICIPAL CORPORATION CANNOT BE IMPAIRED** by restricting its power of taxation to the point of disabling it from performance or by a repeal of the law under which the obligation was to be enforced, or by enacting statutes of limitations that do not allow a reasonable time for bringing an action. *People v. Common Council*, 563.

MURDER.

See HOMICIDE.

NATURAL GAS.

See REAL PROPERTY, 8.

NEGLECTENCE.

1. DECLARATION, WHEN SUFFICIENT TO SUPPORT VERDICT FOR PLAINTIFF.

An allegation in a complaint in an action to recover damages for personal injuries caused by the struggles of a horse whose feet were caught in a hole in a bridge is sufficient to support a verdict for injury to plaintiff's left arm and shoulder, when it states that he has lost the use of that arm and shoulder, and is permanently disabled in the same, although it does not appear that the arm or wrist was broken, or the shoulder dislocated, as is averred in another count. *La Duke v. Township of Exeter*, 357.

2. PROXIMATE AND REMOTE CAUSE.—The negligence of a township in failing to keep one of its bridges in repair is the proximate cause of injuries received by a traveler in attempting to control the struggles of his horse after it has caught its feet in a hole in such bridge. *La Duke v. Township of Exeter*, 357.

See CARRIERS, 11; CORPORATIONS, 26; DAMAGES, 5; HUSBAND AND WIFE, 2, 3; NEGOTIABLE INSTRUMENTS, 1; REAL PROPERTY, 4, 5, 7, 8; WATERS, 4; WITNESSES, 10.

NEGOTIABLE INSTRUMENTS.

1. FRAUD IN PROCURING.—A negotiable note procured to be executed by a person unable to read or write, by representing to him that it was an entirely different contract, is void even in the hands of a *bona fide* holder if, in the judgment of the jury, the maker of the note was not under the circumstances guilty of negligence. *Willard v. Nelson*, 455.2. EVIDENCE OF FRAUD IN OBTAINING.—Under allegations in an answer by an indorser in an action on a note that it was obtained from the maker by fraud and misrepresentation, and without consideration, and that the holder knew it had been so obtained, and that he never paid value for it, evidence is inadmissible to show that the note in suit was a renewal of two prior notes which were given for certain property under false representations, and that the holder of the note in suit claiming to be an innocent purchaser of such prior notes was all the time a partner of the vendor making such false representations. *Clough v. Holden*, 393.3. EVIDENCE OF FRAUD IN OBTAINING.—In an action against an indorser of a note, evidence to show the fraudulent character of a prior note for which the note in suit was given, and knowledge of such fraud by the holder, is inadmissible in the absence of an allegation that the original note was obtained by fraud. *Clough v. Holden*, 393.

4. NEGOTIABLE INSTRUMENTS—EXECUTION OF BY OFFICER OF CORPORATION —WHO BOUND BY.—A note by which a corporation promises to pay a certain sum, not signed in the name of the corporation, but by an individual as "general superintendent," is not conclusively the note of the corporation. It may be shown to be the personal note of the party so signing it. In an action to charge him personally the burden of proof

is on him to show affirmatively that in so making the note he had authority to bind the corporation. *Frankland v. Johnson*, 234.

5. **NEGOTIABLE INSTRUMENTS TRANSFERRED AS COLLATERAL SECURITY, RIGHTS OF HOLDERS OF.**—A *bona fide* holder of commercial paper taken as collateral security for a debt, created either before or at the time of the transfer, is entitled to enforce payment thereof, without regard to equities existing between prior parties of which he has no notice; and when, in an action by such holder to recover upon an instrument thus transferred, the maker's counsel, at the close of the charge to the jury, suggests in a colloquy with the trial judge that the law is otherwise, an omission to correct that suggestion and state the true rule is reversible error. *Crump v. Berdan*, 345.
6. **ACCOMMODATION PAPER.**—If the person for whose benefit accommodation notes are made pays them off as they fall due, but, instead of canceling them, passes them to a third person, they cannot be enforced by him, and if they are enforced by means of the sale of property under a trust deed given to secure their payment, such sale is fraudulent, and will be vacated in equity. *Cottrell v. Watkins*, 897.
7. **ACCOMMODATION PAPER TRANSFERRED AFTER MATURITY** is subject to the same defenses as if it had been given for value, including the defense of its payment before such transfer by the person for whose benefit it was made. *Cottrell v. Watkins*, 897.
8. **AN INDORSER OF AN ACCOMMODATION NOTE** after maturity, with or without knowledge of its consideration, may enforce it against the prior parties to the same extent as if it had been executed for value, if his immediate indorser was entitled to so enforce it. *Cottrell v. Watkins*, 897.
9. **PROTEST—DUTY OF NOTARY PUBLIC** when he receives a note for protest is to make demand for payment of the party primarily liable at his usual place of business, within business hours. *Clough v. Holden*, 393.
10. **PROTEST—PRESUMPTION AND EVIDENCE TO REBUT.**—If the certificate of protest of a notary public states that he presented the note for payment at the place named therein at 5:20 o'clock P. M., the certificate is sufficient on its face to raise the presumption that demand was made within business hours, but evidence is admissible to rebut such presumption and to show that the hour named was not within the customary business hours in the place where the note was made payable. *Clough v. Holden*, 393.
11. **PRESENTMENT FOR PAYMENT—WHEN SHOULD BE MADE.**—When presentment of a note for payment is made at the place of business of the maker, it must be during the hours when such places are customarily open, or at least while some one is there competent to give an answer. Only when presentment is at the residence is the time extended to the hours of rest. *Clough v. Holden*, 393.
12. **DEMAND OF PAYMENT—WHAT NOT SUFFICIENT.**—A call by a notary at the business office of the maker of a note, in his absence after business hours and after the office has been closed for the day, with no other effort to find him, is not a sufficient presentment for payment to bind the indorser. *Clough v. Holden*, 393.
13. **DEMAND FOR PAYMENT.**—If a note is payable at a particular place of business, whether a bank or not, it is sufficient for the holder, in order to charge the indorser, to present the note for payment at the specified place within business hours. He is under no obligation in case of dis-

honor at that place, to present it for payment elsewhere, or personally to the maker. *Clough v. Holden*, 393.

14. **STIPULATION TO PAY INTEREST, EFFECT OF.**—The negotiable character of a promissory note is not destroyed by the insertion of a stipulation that, if it is not paid when due, the maker will "pay ten per cent interest from date until paid." *Crump v. Berdan*, 345.
15. **ESCROW.**—**WRITTEN INSTRUMENT CAN BECOME AN ESCROW ONLY** when placed in the hands of a person not a party to it. A note placed in the hands of one of several joint makers by the others, under an agreement among themselves with reference to its delivery, is not an escrow. *Carter v. Moulton*, 259.
16. **DELIVERY BY PRINCIPAL, WHEN BINDS SURETY.**—If a negotiable promissory note, perfect in form, executed by a number of persons, is intrusted to one of the makers by all, it is presumed that the party holding the note has authority to deliver it to the payee, and when the note is presented by such party to the payee without notice to the latter of any agreement between the makers affecting the right to so deliver it, the payee is justified in assuming that the parties who signed the note intended to be bound thereby, and may receive it and deliver to the principal the consideration therefor, and thereby bind the other makers, without first making inquiries of them for the purpose of learning whether or not there are any secret agreements affecting the instrument. *Carter v. Moulton*, 259.
17. **DENIAL OF LIABILITY—PRACTICE.**—Although in an action on a note, the party sought to be charged personally as maker does not deny the execution of the note by plea verified by affidavit, he may nevertheless deny that it ever became his personal obligation, and show that he executed it in behalf of a corporation of which he was superintendent. *Frankland v. Johnson*, 234.

See FORGERY, 2.

NEWSPAPERS.

See LIBEL, 1.

NEW TRIAL.

CRIMINAL PRACTICE.—The commission to jail by the court in the presence of the jury of a witness for the defendant, because of the character of the evidence given by him while on the stand, is not a legal error entitling the accused to a new trial. *People v. Hayes*, 572.

NONSUIT.

See TRIAL, 2.

NOTARIES PUBLIC.

OFFICERS—NOTARIES PUBLIC INELIGIBLE TO HOLD CIVIL OFFICE OF PROFIT, WHEN.—The office of notary public is a "civil office of profit" within the meaning of the provision of the constitution of Nevada, section 9, article 4, which declares that "no person holding any lucrative office under the government of the United States, or any other power, shall be eligible to any civil office of profit under this state." *State v. Clark*, 517.

See NEGOTIABLE INSTRUMENTS, 9, 10, 12.

NOTICE.

See **BOARDS OF HEALTH; CARRIERS, 8; DEEDS, 1, 2; INSURANCE, 11, 12; MUNICIPAL CORPORATIONS, 8, 9; RAILROADS, 4; TRIAL, 1.**

NUISANCES.

1. **STREETS, NUISANCES IN.**—Any unauthorized permanent erection or structure materially encroaching upon a public street or highway, or impeding or interfering with travel, is a nuisance *per se*, and may be abated, though ample space is left for the passage of the public. *Savage v. Salem, 688.*
 2. **STREETS, NUISANCES IN.**—**WATER TANKS** erected and maintained in the public streets by a private person for private gain, by the authority and permission of the municipality, at places designated and selected by its agent and under his supervision, are not public nuisances *per se* if erected and maintained for a public purpose, such as street sprinkling, although they may become nuisances in fact by subsequent use. *Savage v. Salem, 688.*
 3. **CONSTITUTIONAL LAW.**—**BOARDS OF HEALTH CANNOT MAKE ANY FINAL AND CONCLUSIVE DETERMINATION** of a nuisance, resulting in the destruction of property or the imposition of penalties, unless the party whose interests are to be affected is entitled, as a matter of right, to a hearing as a condition precedent to the making of such determination. *People v. Board of Health, 522.*
 4. **POWER TO DECLARE WHAT IS.**—A statute giving a board of health power to suppress, abate, and remove any public nuisance detrimental to the public health does not authorize such board to act except when a nuisance really exists, and its determination of such existence cannot be conclusive, though probably it will be attended by a presumption that the board acted legally and correctly. *People v. Board of Health, 522.*
 5. **LIABILITY OF PERSONS ABATING.**—If public authorities, such as municipal boards of health, abate that as a nuisance which is not such in fact they are subject to the same liabilities as an individual guilty of a like wrong. *People v. Board of Health, 522.*
- See **CERTIORARI; INTOXICATING LIQUORS, 1; MUNICIPAL CORPORATIONS, 5-7; REAL PROPERTY, 3.**

OBSTRUCTIONS.

See **MUNICIPAL CORPORATIONS, 5-7; NUISANCES, 1.**

OFFICERS.

1. **DE FACTO OFFICER IS ONE WHO ACTS** under color of a known and valid appointment, but has failed to conform to some precedent requirement, as to take an oath, give a bond, or the like. *Weatherford v. State, 828.*
2. **OFFICER DE FACTO, WHO IS.**—An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised: 1. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; 2. Under color of a known and

- valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; 3. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise; such ineligibility, want of power, or defect being unknown to the public; 4. Under color of an election or appointment by, or pursuant to, a public unconstitutional law, before the same is adjudged to be such. *Walcott v. Wells*, 478.
2. **DE FACTO OFFICERS HAVE AUTHORITY TO PREVENT OPEN VIOLATIONS OF LAW** committed in their presence by arresting the parties guilty of such violations, and they also have authority to summon citizens to aid them making such arrests. *Weatherford v. State*, 828.
3. **DE FACTO OFFICERS—RIGHTS OF PARTY SUMMONED TO ASSIST IN MAKING ARREST.**—A citizen summoned by a known *de facto* officer to assist in arresting a person guilty of an open violation of law in their presence, is justified in obeying the summons and in the discharge of the duty thus imposed upon him, does not act at his own peril because of the defective deputation or nonrecord of the officer's right or title to his office. *Weatherford v. State*, 828.
4. **ELIGIBILITY, MEANING OF.**—The word eligibility, when used in regard to the qualifications of candidates for public offices, includes capacity to hold, as well as to be elected, and is no less applicable to appointive than to elective offices. *State v. Clarke*, 517.
5. **OFFICES CREATED BY UNCONSTITUTIONAL LAW, PERSONS FILLING ARE USURPERS.**—An office which it is attempted to create by an unconstitutional law has no legal existence, and is without any validity. Any person who undertakes to fill such a pretended office, whether by appointment or otherwise, is a usurper, whose acts are absolutely null and void, and may be questioned by any private suitor, in any kind of an action or proceeding. *Walcott v. Wells*, 478.
7. **OFFICE, TITLE TO, WHEN NOT COLLATERALLY IMPRACHABLE.**—Where an office has been legally created, and the illegality, if any, of the incumbent's tenure consists merely in the fact that his appointment was an attempt to fill such office in a way not authorized by law, he will, if his right to perform the duties of the office has been generally acquiesced in and recognized by the public, be deemed a *de facto* officer, and therefore his title cannot be indirectly questioned in a proceeding to obtain a writ of prohibition to prevent him from doing an official act. *Walcott v. Wells*, 478.
- See CONSTITUTIONS, 2; CORPORATIONS, 21-25; HOMICIDE; JUDICIAL SALES, 1, 2; NOTARIES PUBLIC; PROHIBITION, 4; STATUTES, 19; SURETYSHIP, 4.

OPINIONS.

See WITNESSES, 8.

OPTIONS.

See HUSBAND AND WIFE, 5; VENDOR AND PURCHASER, 1.

ORDINANCES.

See EMINENT DOMAIN, 8; MANDAMUS, 1; MUNICIPAL CORPORATIONS, 4, 10-12.

PARENT AND CHILD.

1. **RIGHT TO CUSTODY OF ILLEGITIMATE CHILD.**—The mother has the superior legal right to the custody and control of her minor illegitimate children, and can transfer such custody and control to another. This legal right in the mother or her transferee is not absolutely beyond the control of other attendant circumstances. *Marshall v. Reams*, 118.
2. **CUSTODY OF MINORS.**—In applications for the custody of minor children the court is not bound to deliver the child to the claimant, but may, if the interest of the child demands it, leave it where its welfare will be best promoted. *Marshall v. Reams*, 118.
3. **CUSTODY OF MINORS—ELEMENTS CONTROLLING.**—In a contested application for the custody of a minor child the benefit and welfare of the child are most to be regarded. The ties of nature and of association, the character of the applicant, the child's age, health, and sex, the moral or immoral surroundings of its life, the benefits of education and development, the pecuniary prospects, as well as many other considerations, should influence the judicial determination, and the choice of the child when it has reached the age of intelligent discretion also plays an important part as between rival claimants to the same custody. *Marshall v. Reams*, 118.
4. **CUSTODY OF MINOR—RIGHT OF CHILD TO CHOOSE.**—In a contested application for the custody of a minor child, such child, if it has reached the age of discretion, may often be allowed to make its own choice, though the person chosen is not the one whom the court would voluntarily appoint; but this is no controlling legal right of the child. Welfare controls choice, and the choice of the infant cannot be permitted to lead it into improper custody. The court is also bound to respect the rights of the parent or guardian, and cannot allow these rights to be overthrown by the mere wishes of the child when such parent or guardian is a proper person to be intrusted with the child. *Marshall v. Reams*, 118.
5. **CUSTODY OF MINOR—RIGHT OF CHILD TO CHOOSE.**—In a contested application for the custody of a minor child the wishes of the child of sufficient capacity to choose for itself should be given special consideration when its parents have for a long time voluntarily allowed it to live in the family of another, and no coercive order will be made in such case to enforce the mere legal right of the parent to the custody as against the manifest inclination and reasonable choice of the child to remain where it is. *Marshall v. Reams*, 118.
6. **CUSTODY OF MINORS.—AGE OF DISCRETION OF CHILD TO CHOOSE** the custody to which it should be committed is not fixed, but mental capacity is the test, and when the minor shows sufficient capacity mentally to exercise an intelligent choice, and no objection can be made to the person chosen, the court ordinarily allows such choice to prevail, regardless of the age of the child. *Marshall v. Reams*, 118.
7. **CUSTODY OF MINORS—ELEMENTS AFFECTING RIGHT TO—RIGHT OF CHILD TO CHOOSE.**—A parent, or one standing *in loco parentis*, may moderately chastise for correction a child under his control or authority. If such child has been committed by its parent to an uncle to raise, and he has inflicted immoderate and cruel punishment to such an extent as to alienate its affections and to cause it to desire a liberation from his control, the court should not, on *habeas corpus*, restore the child to the uncle when it appears that the child has reached

an age of intelligent discretion, and has deliberately chosen to remain with a stranger against whom no objection can be made, and who has obligated himself to provide for the child in a manner more favorable than would be its condition with its uncle. *Marshall v. Reams*, 118.

See EVIDENCE, 10; INCEST, 5, 6.

PAROL.

See EVIDENCE, 7, 8; JUDGMENTS, 11; TRUSTS, 5.

PARTIES.

See CORPORATIONS, 5; JUDGMENTS, 9, 10.

PARTITION.

1. ADMINISTRATORS have no authority to institute or maintain proceedings for the partition of land in which their intestates were interested. *Terrell v. Weymouth*, 94.
 2. WHEN VOID AS TO MINORS.—Proceedings to partition land in which minors are interested are void as to them unless they are made parties thereto and personally served with process. *Terrell v. Weymouth*, 94.
- See ESTOPPEL, 3.

PARTNERSHIP.

1. PARTNER AS GENERAL AGENT OF THE FIRM.—Each partner is the general agent of his copartners as to the firm business, and the members of the firm are considered as sanctioning the contract which they angly enter into. *Edwards v. Dillon*, 199.
2. POWER OF PARTNER TO SELL AND WARRANT.—When each partner in a firm dealing in stallions has power to sell, he also has the further power to warrant the quality of the horse sold as to its fitness for the purpose for which it is sold. *Edwards v. Dillon*, 199.
3. POWER OF PARTNER TO BIND FIRM BY CONTRACT UNDER SEAL.—If one partner executes an instrument under seal in the name of the firm, it is binding upon the firm when an express or implied authority or confirmation can be justly established, though not under seal, whether it be verbal or in writing, or circumstantial. The prior assent or subsequent ratification may not only be by parol, but may be implied from declarations or from acts and circumstances, or from other evidence tending to show assent or ratification. *Edwards v. Dillon*, 199.
4. CONTRACT UNDER SEAL AS EVIDENCE.—In the simple transfer of personal property, the addition of a seal to the writing neither adds to, nor detracts from, the effect of the transfer, and if the writing is signed and sealed in the firm name by one partner, it is not thereby rendered inadmissible in evidence against the other partners. *Edwards v. Dillon*, 199.
5. CONTRACTS—WHEN SEAL MAY BE DISREGARDED.—If an instrument executed by one partner in the firm name under seal is valid without a seal, and within the scope of the partnership business, and within the powers belonging to each partner, the seal may be disregarded, and the instrument ratified as a simple contract of the firm. *Edwards v. Dillon*, 199.
6. CONTRACTS BY PARTNER UNDER SEAL—WHEN SEAL MAY BE DISREGARDED.—When the covenants or obligations in a bill of sale of per-

sonalty, as well as the transfer of the property itself, are within the ordinary scope of the partnership business, and within the powers of each individual partner, the nonexecuting partners are not relieved from liability upon such obligations by the mere fact that the partner signing the firm name affixes a seal. *Edwards v. Dillon*, 199.

See NEGOTIABLE INSTRUMENTS, 2; WITNESSES, 4.

POSSESSION.

See ADVERSE POSSESSION; CORPORATIONS, 21; GIFTS, 5.

PATENTS.

1. **CONSTRUCTION OF CONTRACT LICENSING THE USE OF.**—By a contract in which the defendant agreed to manufacture and use an invention and attach it whenever it would be practicable to all the various machines manufactured and sold by it and to pay plaintiff a royalty on each machine manufactured and sold and having such invention attached, and stipulating that the plaintiff would neither use, nor license others to use, his invention, the parties established the relation between themselves of licensor and licensee of the patented invention. Plaintiff's cause of action to recover compensation is not entire so that one judgment in his favor exhausts his whole right of action, but is in the nature of a demand for royalties, dependent upon the number of machines manufactured to which his invention was applied. *Skinner v. Wood Mowing etc. Machine Co.*, 540.
2. **A LICENSEE OF A PATENT RIGHT MAY CHANGE HIS POSITION** by renouncing his rights and declaring his intention to manufacture in hostility to, and in defiance of, the patent on the ground that it is a nullity. To do so he must fully announce his position and put himself in the clear and unmistakable attitude of an infringer having no defense except the invalidity of the patent. *Skinner v. Wood Mowing etc. Machine Co.*, 540.
3. **A LICENSOR IS ENTITLED TO ASSUME** that his licensee remains such until the latter by a clear, definite, and unequivocal notice emanating from lawful and competent authority, throws off the protection of the license and stands admittedly an infringer of the patent, if it is valid. *Skinner v. Wood Mowing etc. Machine Co.*, 540.
4. **A CORPORATION LICENSED TO MANUFACTURE ARTICLES AND USE** a patented invention does not renounce its rights nor relieve itself from liability as a licensee by its auditing board refusing to pay royalties on the ground that the patent is invalid. *Skinner v. Wood Mowing etc. Machine Co.*, 540.

See TAXES, 1.

PAYMENT.

1. **PAYMENT, WHAT AMOUNTS TO.**—The law requires payment in money, and nothing else answers the purpose, unless accepted by the creditor or his agent, duly authorized. *State Bank v. Byrne*, 332.
2. **WHAT IS NOT.**—The transfer of property by a debtor to his creditor cannot be regarded as in payment of the debt, or any portion of it, when there is no express agreement that it shall be accepted in payment, or fixing its value, nor can the intention on the part of the debtor that the property shall be accepted in payment of his debt oper-

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ate to discharge it, if his purpose was neither assented to, nor known by, the creditor. *Borland v. Nevada Bank*, 32.

2. **PAYMENT OF DRAFT, WHAT DOES NOT AMOUNT TO.**—The fact that it is the understanding between a bank and a depositor that drafts upon the latter, which the bank receives for collection, are, when accepted and passed it back to the bank, to be treated as checks and charged against his account, cannot, as against the drawer of an instrument so accepted and redelivered, operate as payment thereof. *State Bank v. Byrnes*, 332.

See **NEGOTIABLE INSTRUMENTS**.

PEDDLERS.

- A **PEDDLER** IS AN ITINERANT VENDOR OF GOODS who sells and delivers the identical goods he carries with him. One who sells by sample, taking orders for goods to be thereafter delivered, and to be paid for wholly or in part upon subsequent delivery, is not a peddler. *State v. Lee*, 649.

PERJURY.

See **TRIAL**, 4.

PERSONAL PROPERTY.

- ACCESSION.**—WHERE THE PRINCIPAL MATERIALS NECESSARY TO THE MANUFACTURE of articles are furnished by one party, and another is to furnish other materials and to perform labor so as to complete the manufactured articles, the materials added by the latter become by accession the property of the former, to whom the whole of the manufactured articles belong, though he refuses to receive them because they are not manufactured in the manner exacted by the contract between the parties. *Mack v. Snell*, 534.

See **PARTNERSHIP**, 4.

PHYSICIANS AND SURGEONS.

See **STATUTES**, 15-17.

PLEADING.

- VARIANCE, HOW PRESENTED AS QUESTION OF LAW.**—To present the question of variance as one of law, the evidence should be objected to on that ground at the time it is offered, or when the variance becomes apparent, counsel should move to exclude the evidence, or in some other appropriate way the question should be so raised that the trial judge can pass upon it; and to properly raise the question in any of these modes the variance should be distinctly pointed out, so as to enable the trial judge to pass upon it understandingly, and to enable the plaintiff, if such course should become necessary, to obviate the objection by an amendment to the declaration. *Libby v. Scherman*, 191.

See **CORPORATIONS**, 26; **EJECTMENT**; **FRAUD**; **JUDGMENTS**, 11; **LIBEL**, 4, 5; **LIMITATIONS OF ACTIONS**, 1, 2; **NEGLECTANCE**, 1; **TRIAL**, 1; **VENDOR AND PURCHASER**, 4.

POLICE POWER.

See **MUNICIPAL CORPORATIONS**, 10; **STATUTES**, 14, 13.

POLLUTION.

See WATERS, 2.

POSTNUPTIAL SETTLEMENT.

See DOWER, 2.

POWERS.

POWERS DISTINGUISHED FROM RIGHTS OF PROPERTY.—A power of disposition does not imply ownership, but is a mere authority conferred by the instrument creating it. *Ducker v. Burnham*, 125.

See ESTATES, 11.

PRACTICE.

See APPEAL.

PREFERENCES.

See AMENDMENT FOR THE BENEFIT OF CREDITORS, 6; CORPORATIONS, 17; TRUSTS, 3, 4.

PRESCRIPTION.

See EASEMENTS, 1; EJECTMENT.

PRESENTMENT.

See NEGOTIABLE INSTRUMENTS, 11-12.

PRESUMPTIONS.

See ADVERSE POSSESSION, 1; APPEAL, 10; CHATTEL MORTGAGES; EVIDENCE, 5; INSURANCE, 5; MUNICIPAL CORPORATIONS, 1; NEGOTIABLE INSTRUMENTS, 10; RAILROADS, 6; TRUSTS, 6; WILLS, 1.

PRINCIPAL AND AGENT.

See AGENCY.

PRIORITY.

See MORTGAGES, 2.

PRIVILEGE.

See WITNESSES, 1, 2.

PRIVILEGED COMMUNICATIONS.

See WITNESSES, 6.

PROCESS.

AMENDMENT OF SUMMONS.—If a summons is improperly made returnable to the court in term time, the court may direct that it be amended so as to make it returnable before the clerk on a day certain. *Simmons v. Norfolk etc. Steamboat Co.*, 614.

See JUDGMENTS, 4; JURISDICTION, 2; MARRIAGE AND DIVORCE, 1; MORTGAGES, 5.

PROHIBITION.

1. **NATURE OF THE WRIT GENERALLY.**—A writ of prohibition should not be granted except in cases of usurpation or abuse of power, and not then unless the other remedies provided by law are inadequate to afford full relief. *Walcott v. Wells*, 478.
2. **WHEN THE WRIT DOES NOT LIE.**—Errors of an inferior court in the exercise of its admitted jurisdiction, as in dismissing a case, or deciding that it has been transferred to a federal court, are properly reviewable on appeal and do not justify a resort to the extraordinary remedy of prohibition. *Walcott v. Wells*, 478.
3. **QUESTIONS NOT REVIEWABLE IN PROCEEDINGS TO OBTAIN WRIT OF.**—The question whether a case has been transferred from a state to a federal court can be finally determined only in the latter court, and therefore cannot be raised in proceedings to obtain from the supreme court of the state a writ of prohibition to restrain the trial of the case in the state court, from which it is alleged to have been transferred. *Walcott v. Wells*, 478.
4. **TITLE TO OFFICE NOT TRIABLE IN PROCEEDINGS TO OBTAIN WRIT OF.**—The validity of the acts of an officer *de facto* cannot be questioned by an application for a writ of prohibition to restrain those acts, but only by a direct proceeding in *quo warranto* to determine his right to hold the office. *Walcott v. Wells*, 478.

See OFFICERS, 7.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS; VENDOR AND PURCHASER, 2.

PROMOTERS.

See CORPORATIONS, 1, 2, 5.

PROOFS OF LOSS.

See INSURANCE, 6, 7, 12.

PROSECUTING ATTORNEYS.

See APPEAL, 13; INDICTMENT, 1, 8.

PROTEST.

See NEGOTIABLE INSTRUMENTS, 9, 10.

PUBLICATION.

See CONTEMPT, 3; JURISDICTION, 2.

PUBLIC POLICY.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 1; REAL PROPERTY, 3;
WAGERS, 1.

PUBLIC WRITINGS.

See EVIDENCE, 12-14.

PUNISHMENT.

See IMPRISONMENT; STATUTES, 6-8.

QUO WARRANTO.

-See PROHIBITION, 4.

RAILROADS.

1. **COMMON CARRIERS—LIABILITY OF, WHEN TERMINATES.**—The liability of a railroad company, as a common carrier of freight, ceases upon the unloading of the goods from the car at the place of destination, and placing them in a safe and secure warehouse; or, if the carrier is not required or expected, in the usual course of business, to remove the freight from the car, then by delivering the car in a safe and convenient position for unloading, at the elevator, warehouse, or other place designated by the contract, or required in the usual course of business; or if no place of delivery is thus designated or required, then on its sidetrack in the usual and customary place for unloading by consignees. *Gregg v. Illinois Cent. R. R. Co.*, 238.
2. **CARRIERS, LIABILITY OF, AFTER DELIVERY IS COMPLETE.**—A railroad company is not liable for the value of goods destroyed by fire while lying in one of its cars, if those goods have been completely delivered, and are merely suffered to remain in the car for the convenience of the consignee. *Whitney Mfg. Co. v. Richmond etc. R. R. Co.*, 767.
3. **CARRIERS—DELIVERY, EVIDENCE INCOMPETENT TO SHOW COMPLETION OF.** In an action by a consignee to recover the value of goods burnt in one of the defendant's cars, while it was lying on a siding, constructed solely for the use of the plaintiff, testimony as to the manner in which the defendant has been accustomed to deliver goods to consignees at a public siding is incompetent in regard to the question whether the delivery to the plaintiff was complete. *Whitney Mfg. Co. v. Richmond etc. R. R. Co.*, 767.
4. **COMMON CARRIERS—LIABILITY FOR FAILURE TO GIVE NOTICE OF NON-REMOVAL OF FREIGHT.**—When the owner of goods ships them by rail to himself, with directions to the carrier to notify the owner's agent of their arrival only, the failure of the carrier to notify such owner of the failure of his agent to remove or care for the goods after notice of their arrival does not render the carrier liable for their loss unless such failure on its part has operated to the injury of the owner. *Gregg v. Illinois Cent. R. R. Co.*, 238.
5. **COMMON CARRIERS—PLACE OF DELIVERY TO TERMINATE LIABILITY AS CARRIER.**—If the consignee fails to designate a place of delivery for freight carried by rail, the contract of carriage should determine when the cars, in proper and safe condition, are placed at the usual and ordinary place of keeping or storing cars containing like freight, upon the railroad company's tracks, and where they can be safely and conveniently unloaded. In such case the question to be determined is whether or not anything remains to be done by the carrier in completion of its contract to carry safely and deliver the goods at the place of destination, and, if there is, its liability as a carrier continues; if not, and the goods remain in possession of the carrier, its liability in respect thereto, when not varied by contract or usage, is as a warehouseman only. *Gregg v. Illinois Cent. R. R. Co.*, 238.
6. **COMMON CARRIERS—PRESUMPTION AS TO PLACE OF DELIVERY.**—Upon the arrival of freight at its destination, there being no designated warehouse or place of delivery, and it not being shown that in the usual course of business the carrier is bound to deliver at any particular place, it is to

- be presumed that the consignee is to receive the goods on the track when they are transported by a railroad company. *Gregg v. Illinois Cent. R. R. Co.*, 238.
7. **CARRIERS—CONNECTING RAILROAD COMPANIES, LIABILITY OF, TO TICKET HOLDERS.**—A railroad company is not liable in contract to a passenger traveling on a ticket issued by the agent of a connecting line, unless it is shown that the two companies are joint contractors, or that the company issuing the ticket had authority to bind the connecting company in respect to transportation over its line. *Matthews v. Charleston etc. Ry. Co.*, 773.
 8. **CARRIERS—COUPON TICKETS—TRANSFERABILITY—EJECTION OF HOLDER DAMAGES.**—A coupon railroad ticket over several connecting lines of railroad, issued without limitations or restrictions as to ownership is transferable after being partly used, though issued and sold at a reduced rate, and entitles the holder to ride thereon and to recover damages for expulsion from the train when he presents such ticket in payment of his fare. *Nichols v. Southern Pac. R. R. Co.*, 664.
 9. **CARRIERS—COUPON TICKETS—CONTINUOUS PASSAGE.**—The purchaser or holder of a coupon railroad ticket over connecting lines is not bound to make a continuous trip from the starting point of destination unless there is a stipulation upon the ticket to that effect. He is entitled to stop-over privileges at the end of each line, but when he has started over any of the connecting lines he is bound to continue to the point on that line named in his coupon. *Nichols v. Southern Pac. R. R. Co.*, 664.
 10. **A REGULATION REQUIRING THE PRODUCTION OF TICKET** as evidence of the right to ride is reasonable, and one with which the traveling public is assumed to be familiar. *Van Dusen v. Grand Trunk Ry.*, 354.
 11. **CARRIERS—EVIDENCE—DECLARATIONS OF A RAILROAD TICKET INSPECTOR**, on examining a ticket, that he rejected it solely on the ground that it was presented by a person other than the original purchaser, are admissible against the railroad company to show that the ticket was genuine and authorized when originally issued and sold. *Nichols v. Southern Pac. R. R. Co.*, 664.
 12. **EVIDENCE—INTEREST AS AFFECTING ADMISSIBILITY OF.**—A statement made by a conductor on a railroad train at the time of taking a passenger's ticket that the train does not stop at the passenger's destination, and that he will have to get off at another station, is a mere declaration by the company's agent in its interest, and is not admissible as evidence of the fact stated. *Sira v. Wabash etc. R. R. Co.*, 386.
 13. **EXPULSION OF PASSENGER—BURDEN OF PROOF.**—In an action against a railroad company by a passenger to recover damages for being ejected from the train before reaching the station to which the company has contracted to carry him, proof that the train habitually stopped at such station when it was the destination of a passenger on board is sufficient proof of a rule requiring it to do so, and puts the burden of proof on the company to show that such stops are exceptional, and made under special instructions. *Sira v. Wabash R. R. Co.*, 386.
 14. **EXPULSION OF PASSENGER FOR NONPRODUCTION OF TICKET—MEASURE OF DAMAGES.**—When the conductor of a train, in taking up one of the coupons of a return ticket, neglects to give the holder a check which, by the regulations of the company, is made the sole evidence of his right to continue his journey beyond a junction station, at which he is to change cars, and, upon the failure of the passenger to produce a check

after such change of cars, the second conductor insists on his paying his fare, and in consequence of his refusal to do so, ejects him from the train without unnecessary force, he cannot recover more than the value of the ticket of which he has been wrongfully deprived by the mistake of the first conductor, the evidence showing that he had sufficient money to pay his fare, and actually proceeded to his destination by a later train on the same day. *Van Dusen v. Grand Trunk Ry.*, 354.

15. **RAPE—EXPULSION FROM TRAIN AS PROXIMATE CAUSE OF.**—If a young lady is wrongfully put off a railroad train before reaching her destination, and a rape is afterwards committed on her by a passenger who leaves the train where she is put off, the rape is not the direct and immediate consequence of the wrongful act of expelling her when it appears that the station at which she is put off is not an inappropriate or unsafe place for a young and inexperienced female passenger traveling alone to remain until the arrival of a train to carry her to her destination, and that the conductor who allowed the passenger committing the rape to take such female passenger from the train had no reason at the time to believe or suspicion that she would be assaulted or even insulted. *Sira v. Wabash etc. R. R. Co.*, 386.
16. **DUTY TO PROTECT PASSENGERS—LIABILITY FOR BREACH OF SUCH DUTY.**—While it is the duty of a railroad company to preserve order on its trains and to protect its passengers, especially females, from insults and assaults from fellow-passengers, and from annoyances and injuries by disorderly persons, yet to render the company liable in damages for a breach of such duty it is necessary to bring home to the conductor in charge of the train knowledge, or opportunity to know, that the injury was threatened, and to show that by his prompt intervention he could have prevented or mitigated it. *Sira v. Wabash etc. R. R. Co.*, 386.
17. **RIGHT TO REGULATE STOPS.**—A railroad company has the right, in the absence of statutory requirements, to determine for itself what trains shall stop at particular way stations. The traveling public is bound to accommodate itself to such regulations as may have been adopted. *Sira v. Wabash etc. R. R. Co.*, 386.
18. **REFUSAL TO STOP TRAIN AT STATION, WHEN NOT ACTIONABLE.**—The refusal of a conductor to stop a train at a flag station, for the purpose of enabling a passenger holding a ticket for a point beyond to alight, is not an actionable breach of contract, unless it is the custom of the company to accommodate passengers in that manner. The mere fact that the ticket holder has, on previous occasions, been allowed to alight at the flag station does not render the company liable in such a case. *Matthews v. Charleston etc. Ry. Co.*, 773.
19. **LIABILITY FOR NOT DISCHARGING PASSENGER AT DESTINATION.**—If a railroad company contracts to carry a passenger to a particular station, and the train on which passage is taken is one which is required under the regulations of the company to receive and discharge passengers at such station, the company commits an actionable wrong in requiring such passenger to leave the train before arriving at the station named. *Sira v. Wabash etc. R. R. Co.*, 386.
20. **A RAILWAY CORPORATION CANNOT BE EXEMPTED FROM LIABILITY FOR DAMAGES TO PRIVATE PROPERTY** arising from executing its work in the mode authorized by the legislature. The powers granted to such corporations are to be construed as privileges conferred upon the under-

standing that they are to be exercised in strict conformity to private rights, and under the same responsibility as though the acts done in the execution of such powers were done by an individual. *Booth v. Rome etc. R. R. Co.*, 552.

21. **LIABILITY FOR DESTRUCTION OF PROPERTY BY FIRE.**—In the absence of any testimony going to show that a fire by which the plaintiff's goods were destroyed, while in a railway car upon a siding, was started by sparks from one of the defendant's locomotives, it is not error to refuse to submit to the jury the question of the company's liability under a statute relating to fires originating in this manner. *Whitney Mfg. Co. v. Richmond etc. R. R. Co.*, 767.
22. **RAILROAD COMPANY, WHEN NOT LIABLE FOR INJURIES CAUSED BY FOLLOWING ADVICE OF SERVANT.**—No recovery can be had against a railroad company where one of its servants took a child with him upon a gravel train, of which he was in charge, to a place where a siding was in course of construction; and later in the day, while they were sitting near the track watching the laborers, the child expressed a wish to go home, and the servant told him to get on a freight train which happened to be approaching, and the child thereupon mounted a pile of gravel by the side of the track, and when the caboose of the freight train came abreast of him, reached out to take hold of it, the gravel slipped from under his feet while he was so reaching out, and he was consequently thrown between the wheels and seriously injured. *Keating v. Michigan Cent. R. R. Co.*, 328.
23. **RAILROAD COMPANIES, DUTY OF, TO FURNISH SAFE APPLIANCES FOR EMPLOYEES.**—A railroad company is required to provide reasonably safe appliances, and keep them in repair, and provide a reasonably safe place for the employee, so as not to expose him to unnecessary danger, but it is not within the province of courts or juries to prescribe the manner of using its tracks, or the character of its appliances, by verdicts and judgments which disregard its right to conduct its business in the manner usual with well-managed roads, and as good railroading demands. *Ragon v. Toledo etc. Ry. Co.*, 336.
24. **DUTY TO FURNISH SAFE PLACE TO WORK, LIMITS OF.**—The duty of a railroad company to furnish its servants with a reasonably safe place to work cannot be extended so as to make it liable for injuries which a brakeman receives through the negligence of a car inspector, in not observing that a car is improperly loaded when it is to be put into a train for transportation. *Dewey v. Detroit etc. Ry. Co.*, 348.
25. **CARE REQUIRED OF SERVANT IN UNCOUPLING A CAR.**—A railroad company has a right to expect that a brakeman will not step between a moving car and engine for the purpose of uncoupling them, without first examining the character of the roadbed, and if he is injured by a defect in the track, in consequence of neglecting this precaution, he cannot recover damages from his employer. *Ragon v. Toledo etc. Ry. Co.*, 336.
26. **SERVANT'S NOTICE OF DEFECT IN TRACK, EFFECT OF.**—The fact that a railroad company has suffered an unfilled space to remain between the ties of a sidetrack will not enable a brakeman to recover damages for personal injuries, caused by stepping into the hole and being caught by a car which he was uncoupling before he could extricate his foot, if the condition of the track at the time of the accident was so manifest, that the plaintiff was, or ought to have been aware that the defect existed. *Ragon v. Toledo etc. Ry. Co.*, 336.

27. NEGLIGENCE, PLEADING IN ACTIONS FOR.—THERE IS NO VARIANCE where the declaration in an action by a railroad employee to recover damages for personal injuries states that the defendant permitted a deep hole or rut to exist in the track, into which the plaintiff stepped, and the evidence tends to prove that there were several holes. This is not a case of proving a number of defects as a ground of inference that another distinct defect existed, but it amounts to showing that several defects existed, one of which might have caused the injury. *Ragon v. Toledo etc. Ry. Co.*, 336.
28. FELLOW-SERVANTS, WHO ARE.—A brakeman and car inspector, whose duty it is to inspect foreign cars received at a junction for transportation on the company's line, and to see that they are properly loaded and in good condition, are fellow-servants. *Dewey v. Detroit etc. Ry. Co.*, 348.
29. PUBLIC STREETS, USES TO WHICH MAY BE PUT.—The owner of land abutting upon a public street, whether he owns the fee of the street or not, has the right to have the street used for proper purposes only, and because the operation of a steam railway therein is not such a purpose, may recover for such operation. Whether he or his predecessors in interest dedicated such land or granted it for street purposes, or whether it was acquired for such purposes by proceedings in the exercise of the power of eminent domain, is not material. *White v. Northwestern etc. Ry. Co.*, 639.
30. PUBLIC STREETS.—THE USE OF A STEAM RAILWAY UPON A PUBLIC STREET is a perversion of the street from its original and proper public purposes. An abutting owner is entitled to recover damages for the construction and use of a steam railway in the street, though it is licensed by the municipal authorities. *White v. Northwestern etc. Ry. Co.*, 639.
31. STREET RAILROADS.—DUTIES ASSUMED BY GRANTEE OF FRANCHISES OF THE ROAD.—The grantee of a street railroad company which, under its deed, takes the road and all of the property and franchises of the grantor as he holds them, and then enters upon and continues the operation of the road, thereby assumes the performance of all public duty theretofore resting on the grantor of furnishing a stated car service as provided for by the ordinance under which the road was constructed. *City of Potwin Place v. Topeka Ry. Co.*, 312.

See CARRIERS; EMINENT DOMAIN, 1, 2; MANDAMUS, 1; TAXES, 2.

RAPE.

1. CRIME OF, WHEN COMPLETE WITHOUT ACTUAL FORCE.—To constitute rape, where there is no actual force used, the woman must have been unconscious, or unable to comprehend fairly the nature and consequences of the sexual act. *State v. Lung*, 505.
2. ATTEMPT TO COMMIT.—NECESSARY ELEMENTS OF CRIME.—To render a man guilty of the crime of an attempt to commit rape, it is not enough that he intended to use the force necessary to accomplish his purpose, notwithstanding the woman's resistance, or in the case of constructive force, either to destroy her power to resist him by the administration of liquors or drugs, or to take advantage of the fact that she was already in a condition in which either the mental or physical ability to resist is wanting; he must, in addition to this, have done some act which, in connection with this intent, constitutes the attempt. *State v. Lung*, 505.

3. **ATTEMPT TO COMMIT—ADMINISTRATION OF CANTHARIDES.**—Sexual intercourse procured by administering cantharides to a woman does not amount to rape, where no actual force is used. Hence proof of an attempt to administer that drug, no offer or endeavor to have connection with the woman, by force or otherwise, being in evidence, will not support an indictment for an attempt to commit rape. *State v. Lung*, 505.
4. **DECLARATIONS OF PROSECUTRIX AS RES GESTÆ.**—In cases of rape anything which the woman said or did of the *res gestæ* of the ravishment, is admissible as original evidence, whether she testifies or not. Aside from and beyond this it is competent to show by her or by others, or both, that, recently after the alleged rape she complained of it to suitable persons, and exhibited, if such was the fact, marks of violence and other like indications, as confirmatory of her testimony; but neither the particulars of her complaint nor the identity of the accused can be thus given as original or independent proof. *Castillo v. State*, 794.
5. **DECLARATIONS OF PROSECUTRIX AS RES GESTÆ.**—In a prosecution for rape, voluntary statements made by the prosecutrix to her grandmother a very few moments after the perpetration of the crime, and to another person in about one-half an hour thereafter, and while she was in great pain, torn, lacerated, and bleeding, to the effect that the man who ravished her had a scar on his face, and had followed her with a bucket in his hand, are admissible in evidence as part of the *res gestæ*. *Castillo v. State*, 794.
6. **CONVICTION FOR LESSER OFFENSES IN PROSECUTION FOR.**—An information for rape necessarily embraces the offense of an assault with intent to commit rape and an assault and battery, and it is therefore error for the court to charge the jury that the defendant in a prosecution for rape must be convicted of that crime, if at all. The jury, in such a case, should be told what constitutes the lesser offenses, and instructed that they may convict the defendant on either of them. *People v. Abbott*, 360.
7. **EVIDENCE ADMISSIBLE TO SHOW RELATIONS OF THE DEFENDANT WITH PROSECUTRIX.**—In a prosecution for rape upon a girl under the age of fourteen years, evidence that the defendant had had intercourse with her prior to the date of the offense charged is admissible, not for the purpose of making it more probable that the crime was committed, but for the purpose of showing the relations of the parties, and the opportunity offered the defendant of meeting her. *People v. Abbott*, 360.
8. **EVIDENCE OF INTERCOURSE WITH OTHER MEN TO IMPROACH CREDIBILITY OF PROSECUTRIX.**—In a prosecution for rape upon a girl under the age of fourteen years, evidence that at other times prior to the alleged offense she had had sexual intercourse with other men is not competent for the purpose of impeaching her credibility. *People v. Abbott*, 360.

See RAILROADS, 15; WITNESSES, 7.

RATIFICATION.

See PARTNERSHIP, 3; VENDOR AND PURCHASER, 5.

REAL PROPERTY.

1. **GROWING GRASS PARTAKES OF THE NATURE OF REALTY.** It does not go to the executor or administrator, but follows the land, and belongs to the heir or devisee. *Matter of Chamberlain*, 563.

2. **INJURY WITHOUT REMEDY.**—There are many cases in which the lawful use of one's property causes injury to adjacent property for which there is no remedy, because no right of the adjacent owner is invaded. *Booth v. Rome etc. R. R. Co.*, 552.
3. **THE TEST OF THE PERMISSIBLE USE OF ONE'S OWN LAND** is not whether the use causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act was in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy. *Booth v. Rome etc. R. R. Co.*, 552.
4. **IF ONE BLASTS ROCK ON HIS PREMISES** in order to adapt them to a lawful use, the mode adopted being the only practicable one, and the work being prosecuted with due care and without negligence, any injury resulting to the adjacent premises is not a legal wrong for which an action may be sustained. *Booth v. Rome etc. R. R. Co.*, 552.
5. **THE USE OF EXPLOSIVES IN EXCAVATING LAND** is not at the peril of the person using them so as to impose liability for injury caused thereby to adjacent property, irrespective of negligence, if such use is a necessary and usual means of adapting the land to any lawful use, although the means used may endanger the house of a neighbor, provided no rock or other substance is cast upon his premises. *Booth v. Rome etc. R. R. Co.*, 552.
6. **PROPERTY—RIGHT TO BUILD UPON.**—The owner of real estate has the right to erect such buildings or other structures thereon as he may please, and may put the premises to any use which may suit his pleasure, provided he does not, in so doing, imperil others. *Crawford v. Topeka*, 323.
7. **IF ONE, BY CARELESSNESS IN MAKING AN EXCAVATION ON HIS LAND, CAUSES INJURY TO AN ADJACENT BUILDING**, though the owner of the house has no easement of support, he is liable. The law exacts from a person undertaking to do even a lawful act on his own premises, which may produce injury to his neighbor, the exercise of a degree of care measured by the danger, to prevent or mitigate injury. *Booth v. Rome etc. R. R. Co.*, 552.
8. **NATURAL GAS—RIGHT OF OWNER TO DRAIN GAS-WELL.**—When a landowner drills a gas-well on his own land without malice or negligence, and in a lawful manner and for a lawful purpose, he cannot be restrained by injunction from draining his well, and permitting the gas to escape therefrom and go to waste, when the only injury resulting to adjoining landholders and gas-well owners is a depletion in the supply of gas in the same basin, or gas-bearing sand-rock in which the lands of all of the parties are situated. *Hague v. Wheeler*, 736.

See DAMAGES, 5; VENDOR AND PURCHASER.

RECALLING JURY.

See TRIAL, 7-10.

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See DEEDS, 1, 2; EVIDENCE, 6, 9, 12-14; IDIOTMENT, 2, 6; JUDGMENT, 2, 11.

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See DAMAGES, 2; WATERS.

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See CORPORATIONS, 19; PATENTS, 1, 4.

SALARY.

See CORPORATIONS, 15, 16.

SALES.

1. WHAT CONSTITUTES.—A sale of personal property is a transfer of the absolute or general property in a thing for a price in money, accompanied by a change in possession. *State v. Wingfield*, 406.
2. WHAT ARE NOT.—A transfer of property cannot be regarded as a sale thereof when no purchase price has been agreed upon, nor has the price

been in any way made definite, nor has any agreement been entered into from which the price can be ascertained. *Borland v. Nevada Bank*, 32.

3. **DELIVERY TO COMMON CARRIER AS PASSING TITLE.**—If goods are delivered to a common carrier for transportation to the purchaser without any condition, such delivery passes the title, although the purchase money is afterwards collected by the vendor or agent at the place from which the goods were ordered. *State v. Wingfield*, 406.
 4. **DELIVERY TO CARRIER, WHEN DOES NOT PASS TITLE.**—When goods are delivered by the vendor to a common carrier, with directions not to deliver to the buyer until the purchase money is paid, the sale is not complete until such condition is complied with. *State v. Wingfield*, 406.
 5. **IMPLIED WARRANTY.**—A dealer contracting to sell an article in which he deals, to be applied to a particular purpose, the buyer necessarily trusting to the judgment of the dealer, impliedly warrants that it is fit for the purpose to which it is to be applied. *Edwards v. Dillon*, 198.
- See **AGENT**, 1, 2; **BAILEMENTS**; **EXECUTION**, 2, 3; **INTOXICATING LIQUORS**; **PEDDLERS**; **VENDOR AND PURCHASER**.

SEAL.

See **PARTNERSHIP**, 3-5.

SEDUCTION.

1. **EVIDENCE—CORROBORATION OF PROSECUTRIX.**—Corroborative evidence of seduction need not be direct and positive, nor such evidence as is sufficient to convict independent of that of the prosecutrix, but simply such facts or circumstances as tend to support her testimony, and shall satisfy the jury that she is worthy of credit. *Wright v. State*, 822.
2. **OFFER TO MARRY AS DEFENSE.**—Up to the moment of conviction the defendant may make an offer in good faith to marry the prosecutrix. If such offer is declined by her, he is entitled to a dismissal of the charge under a statute which provides that if the parties marry each other at any time before the conviction of defendant, or if he in good faith offers to marry the female seduced, no prosecution shall take place, or if begun shall be dismissed. *Wright v. State*, 822.
3. **OFFER OF MARRIAGE.**—THE GOOD FAITH of a defendant on trial for seduction, who in open court offers to marry the prosecutrix then and there, the presiding judge to perform the ceremony, and produces a license authorizing the marriage, cannot be questioned by evidence that he had declared that he would not live with her if married to her. In such case the only test which can be made of his good faith is for the court to proceed to marry the parties, and if the prosecutrix persistently refuses to marry him, it is the duty of the court to dismiss the charge against him. *Wright v. State*, 822.
4. **MARRIAGE FOLLOWED BY DESERTION.**—In cases of seduction the marriage of the parties during the trial of an indictment therefor, though followed by desertion on the part of the husband, is a defense to the indictment, as is also a *bona fide* offer of marriage by the party indicted. *Wright v. State*, 822.
5. **UNCHASTITY AS DEFENSE.**—A promise to marry and carnal knowledge of a woman may exist without seduction, and when a woman has lost her virtue and reputation for chastity, and the promise of marriage only induces a change of lovers, the promisor is not guilty of seduction, no

matter what his civil liability may be for a breach of the promise of marriage. *Mrous v. State*, 834.

6. **UNCHASTITY AS DEFENSE**.—A man who, knowing the unchaste reputation of a female in the community, promises to marry her, and subsequently has sexual intercourse with her by virtue of such promise, may avail himself of the character of the woman for want of chastity as a defense to an indictment for her seduction, whatever his liability may be for breach of promise of marriage. *Mrous v. State*, 834.

See STATUTES, 9.

SERVANTS.

See MASTER AND SERVANT.

SETOFF.

HOMESTEAD—SETOFF AGAINST CLAIMS FOR RENTS AND PROFITS OF.—If a husband and wife induce a person to purchase property and to pay therefor and to obtain a conveyance from a person whose title is invalid, because founded upon a conveyance of such property made by such husband without the joinder of his wife while it was their homestead, the amount so paid constitutes a valid setoff against their claim for the rents and profits of such property while occupied by such purchaser. *Batts v. Sims*, 470.

See EMINENT DOMAIN, 7, 8.

SHERIFFS.

JUDICIAL SALES, 1.

SLANDER.

See LIBEL.

SODOMY.

TO CONSTITUTE CRIME OF SODOMY the act must be in that part of the body where sodomy is usually committed. The act in a child's mouth does not constitute the crime. *Prindle v. State*, 833.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE OF A CONTRACT TO SELL AND CONVEY LAND CANNOT ORDINARILY BE DECREED AGAINST A MARRIED MAN if his wife refuses to join in the deed, there being no proof of fraud on his part in her refusal, unless the purchaser is willing to pay the whole purchase price, and accept a conveyance in which she does not unite. *Graybill v. Brough*, 894.

See DEEDS, 3; VENDOR AND PURCHASER, 1.

STATES.

See EVIDENCE, 2; JUDGMENTS, 2; JURISDICTION, 1, 3; LEGISLATURE; MUNICIPAL CORPORATIONS, 15; VENDOR AND PURCHASER, 2.

STATIONS.

See RAILROADS, 17, 18.

STATUTE OF FRAUDS.

See CONTRACTS, 2; DEEDS, 3; TRUSTS, 5; VENDOR AND PURCHASER, 3, 6.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STATUTES.

1. **CONSTITUTIONAL LAW.—IN PASSING UPON THE CONSTITUTIONALITY OF A STATUTE**, the court must confine itself to the consideration of those matters which appear upon the face of the law and those facts of which it can take judicial notice. Therefore if a statute attempts to authorize the payment of moneys to a street contractor for work for which he has not been able to obtain compensation, because of errors, omissions, and irregularities of municipal officers in their official proceedings connected with such work, the court is not authorized to take evidence and make findings to ascertain what errors, omissions, and irregularities are referred to in the statute. *Conlin v. Board of Supervisors*, 17.
2. **CONSTITUTIONAL LAW—DUE PROCESS OF LAW.**—A statute providing a penalty for its violation, which does not apply to all corporations or individuals of the same nature, but operates only upon certain corporations therein named, is unconstitutional and void, as depriving the corporations named of liberty and property without due process of law. *Braceville Coal Co. v. People*, 206.
3. **CONSTITUTIONAL LAW.—GENERAL LAWS MAY RENDER THAT UNLAWFUL** in many cases which has, prior thereto, been lawful, but laws depriving particular persons, or classes of persons, of rights enjoyed by the community at large, to be valid must be based upon some existing distinction or reason not applicable to others not included within its provisions. *Braceville Coal Co. v. People*, 206.
4. **CONSTITUTIONAL LAW.—STATUTE REQUIRING PAYMENT OF WAGES TO BE MADE WEEKLY** to every employee of certain designated classes of corporations, and imposing a penalty for not making such payment is unconstitutional. *Braceville Coal Co. v. People*, 206.
5. **CONSTITUTIONAL LAW.—IF A CLAIM AGAINST A CITY HAS BEEN AUDITED AND ALLOWED**, and a judgment entered confirming such allowance, the repeal of the statute cannot divest the rights of the holder of the claim. Therefore, notwithstanding such repeal, a writ of mandate should issue to compel the municipality to pay such judgment. *People v. Common Council*, 563.
6. **AN EX POST FACTO LAW IS A LAW** providing for the infliction of punishment upon a person for an act which when committed was innocent, or which aggravates a crime and makes it greater than when committed, or which changes the punishment or inflicts a greater punishment than the law annexed to the crime when committed, or changes the rule of evidence and receives less or different testimony than was required at the time of the commission of the crime in order to convict the offender. *People v. Hayes*, 572.
7. **EX POST FACTO LAWS.**—A statute permitting the infliction of a lesser degree of the same kind of punishment than was permissible when the offense was committed cannot be regarded as an *ex post facto* law. *People v. Hayes*, 572.
8. **EX POST FACTO LAW.**—NO STATUTE WHICH MODIFIES the rigor of the criminal law is regarded as an *ex post facto* law. While there may be cases

in which it is not possible for courts to uphold a statutory change in the manner of punishment, on the ground that such punishment has been mitigated rather than increased, yet if the change is of that nature which no sane man could by any possibility regard in any other light than as a mitigation of punishment, a statute authorising such change is not *ex post facto*, though made applicable to offenses committed before its enactment. *People v. Hayes*, 572.

9. **EX POST FACTO LAW—EVIDENCE OF PROSECUTRIX IN SEDUCTION.**—A statute which enlarges the class of persons who may be competent to testify as witnesses is not *ex post facto* in its relation to offenses previously committed. Hence on a trial for seduction committed before the passage of a statute permitting the seduced female to testify she is properly permitted to give her testimony. *Mrous v. State*, 834.
10. **CONSTITUTIONAL LAW.—ALL CONTRACT OBLIGATIONS** are protected from impairment by the state legislature by the provisions of the federal constitution. *People v. Common Council*, 563.
11. **CONSTITUTIONAL LAW—THE OBLIGATION OF A CONTRACT IS IMPAIRED** by any law which prevents its enforcement or materially abridges the remedy which existed when it was contracted, and does not supply an alternative remedy equally adequate or efficacious. *People v. Common Council*, 563.
12. **CONSTITUTIONAL LAW—ABRIDGMENT OF RIGHT TO CONTRACT.**—A law singling out persons, corporations, or associations engaged in any particular business, and depriving them of the right to contract as persons, corporations, or associations engaged in other business may lawfully do, is unconstitutional and void. *Braceville Coal Co. v. People*, 206.
13. **CONSTITUTIONAL LAW—ABRIDGMENT OF CORPORATION'S RIGHT TO CONTRACT.**—When, by a general incorporation law under which a corporation is organized it is granted the right to contract in and about the business for which it is incorporated, a special law restricting its right to thus contract is necessarily an amendment or change of its charter, and void under a constitutional provision that "no corporation shall be created by special laws, or its charter extended, changed, or amended, but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created." *Braceville Coal Co. v. People*, 206.
14. **CONSTITUTIONAL LAW—POLICE POWER OF STATE—REGULATION OF OCCUPATIONS.**—The right of every person to pursue any lawful business, occupation, or profession, is subject to the paramount right, inherent in every government, as a part of its police power, to impose such restrictions and regulations as the protection of the public may require. *State v. Randolph*, 655.
15. **CONSTITUTIONAL LAW—REGULATION OF PRACTICE OF MEDICINE.**—A statute which makes it unlawful for any person to practice medicine or surgery in the state without first obtaining from the state board of examiners a certificate that he is a graduate of a medical institute in good standing, or if he is not a graduate, that he has been found on examination to be qualified to practice medicine and surgery, or that he was a practitioner of medicine and surgery, and was so engaged at the time of the passage of the act, is not unconstitutional as a discrimination between citizens by permitting one to practice medicine or surgery without examination who was so engaged when the act took effect, while it denies the privi-

lege to another who may wish to engage in such practice after the passage of the act; nor is it unconstitutional as granting privileges or immunities to any citizen or class of citizens within or without the state. *State v. Randolph*, 655.

16. CONSTITUTIONAL LAW—RIGHT TO REGULATE PRACTICE OF MEDICINE.—The power of the legislature to prescribe such reasonable conditions as are calculated to exclude those who are unfitted to discharge their professional duties, is large and comprehensive, and cannot be doubted. *State v. Randolph*, 655.
 17. CONSTITUTIONAL LAW—REGULATION OF PRACTICE OF MEDICINE.—A statute exempting a practitioner of medicine or surgery at the time of its passage from obtaining a diploma or certificate that he is entitled to practice, and requiring all others to obtain such diploma or certificate, is not unconstitutional as granting privileges or immunities to any citizen or class of citizens, nor does it deny to any one the privilege of practicing such profession, when they shall furnish appropriate evidence of their qualifications to do so. *State v. Randolph*, 655.
 18. CONSTITUTIONAL LAW—POLICE POWER—SANITARY LEGISLATION.—The state may enact laws for the preservation of the public health, even at the expense of private rights, and may delegate that power to municipalities. Hence a statute is not unconstitutional which empowers a city council, whenever it shall be of opinion that any lots or grounds within the city are in such a condition or so situated as to be dangerous to the public health, to direct the proprietors of such lots or grounds to fill them up to a given level, and also authorizes the council, in case those proprietors refuse or neglect to comply with such direction, to do the work, and recover the expense thereof from them, provided the amount does not exceed half the value of the land so filled. *Charleston v. Werner*, 776.
 19. PERMISSIVE WORDS USED IN STATUTES conferring power or authority upon public officers or boards will be held mandatory when the act authorized to be done concerns the public interest or the rights of individuals. *People v. Common Council*, 563.
 20. ASSESSMENT OF PROPERTY FOR LOCAL IMPROVEMENT—ENFORCEMENT OF CONSTITUTIONAL LAW.—A statute attempting to authorize a personal judgment against property owners on special assessments for local improvement is unconstitutional and void. *City of Clinton v. Henry County*, 415.
- See BOARDS OF HEALTH; CONTEMPT, 3; DEEDS, 1; EXECUTION, 1; GIFTS, 5; IMPRISONMENT, 1, 2; INCEST, 3; INDICTMENT, 6; INTOXICATING LIQUORS, 1; JUDGMENTS, 6; JURISDICTION, 2; LEGISLATURE; MORTGAGES, 1; MUNICIPAL CORPORATIONS, 14-17; NUISANCES, 4; TAXES, 2, 3; WITNESSES, 4.

STOCK.

See CORPORATIONS, 3-5, 12; JUDGMENTS, 10; TAXES, 1.

STOCKHOLDERS.

See CORPORATIONS, 6-11, 19.

STOPOVER PRIVILEGE.

See RAILROADS, 2.

STREET RAILROADS.

See RAILROADS, 31.

STREETS.

See EMINENT DOMAIN, 1-4, 6, 8; EVIDENCE, 14; MUNICIPAL CORPORATIONS, 1-7, 13-15; NUISANCES, 1, 2; RAILROADS, 29-31.

SUBLETTING.

See LANDLORD AND TENANT, 9, 17.

SUBROGATION.

1. SUBROGATION Is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the right of the creditors in relation to the debt. The ground of relief does not stand entirely upon the notion of mutual consent, either expressed or implied. *Liles v. Rogers*, 627.
2. IF AN OBLIGATION IN FAVOR OF A CREDITOR IS FULLY PAID AND DISCHARGED so that he can assert no further right under it, no other person can be subrogated to it. *Liles v. Rogers*, 627.
3. PRIVILEGE IS NOT IN ALL CASES NECESSARY to entitle a party to subrogation, but he must have paid money upon request, or as a surety, or under some compulsion made necessary by the adequate protection of his own rights. *Liles v. Rogers*, 627.
4. HOMESTEAD—SUBROGATION.—One who claims title to property in good faith but whose claim is invalid because the property was a homestead, and the wife did not join in the conveyance upon which his title rests, and who pays off a mortgage enforceable against the property, is entitled to be subrogated to the rights of the mortgagee and to have the mortgage revived and enforced for his benefit. *Betts v. Sims*, 470.
5. VENDOR'S LIEN—PAYMENT OF PURCHASE MONEY BY VOLUNTEER—SUBROGATION.—One person cannot acquire a lien upon land purchased by another by the voluntary and unauthorized payment of the purchase money; nor can he by simply paying the debt due the vendor be subrogated to the latter's lien therefor. *Demeter v. Wilcox*, 422.

See SURETYSHIP, 3, 4.

SUMMONS.

See EXECUTION, 1; JUDGMENT, 3; PROCESS.

SUPERSEDEAS.

See APPEAL, 4, 5.

SURETYSHIP.

1. JUDGMENTS AGAINST PRINCIPAL AS EVIDENCE AGAINST SURETY.—In the absence of notice and opportunity to defend, or of assumed responsibility for the result of an action, a judgment against the principal therein is not conclusive against his surety, but can be introduced against him only as evidence of its own existence, and not as evidence of any of the facts upon which its recovery rests. *Grommes v. St. Paul Trust Co.*, 248.
2. SURETY, WHEN BOUND BY DELIVERY BY PRINCIPAL.—If a surety signs and delivers to his principal an instrument perfect upon its face, with a condition that it is not to be delivered to the obligee, payee, or grantee until some person or persons who are agreed upon shall also execute it, and the principal delivers the instrument without regard to the condition and without knowledge thereof on the part of the ob-

ligee, payee, or grantee, the delivery binds the surety. *Carter v. Meulien*, 259.

3. SUBROGATION BETWEEN SURETIES will not be enforced if there are several or successive obligations of suretyship which are not in substance and nature for the same thing, and have no relation to, nor operation upon, each other. *Liles v. Rogers*, 627.
4. SUBROGATION.—IF A PUBLIC OFFICER GIVES SEPARATE BONDS WITH SURETIES, one for the payment of the county taxes collected by him, and another for the payment of the state taxes so collected, and he uses moneys collected for county taxes in payment of moneys collected by him as state taxes, the sureties on his bond to the county cannot maintain a suit against the sureties on his state bond to compel them to repay the moneys thus paid into the state treasury out of the county taxes. The payment to the state treasurer satisfied the bond of the state, and therefore the sureties on the bond of the county cannot be subrogated to the rights of the state on the bond taken for its protection. *Liles v. Rogers*, 627.

See JOINT LIABILITY, 2; LANDLORD AND TENANT, 6, 8, 9, 15, 16; NEGOTIABLE INSTRUMENTS, 16.

SURRENDER.

See LANDLORD AND TENANT, 16.

TAXES.

1. PATENT RIGHTS—TAXATION OF.—The capital stock of a corporation issued for, or invested in, patents or patent rights is not subject to taxation under state laws. *Commonwealth v. Edison Electric Light Co.*, 747.
2. CONSTITUTIONAL LAW—EXEMPTION FROM TAXATION.—Under a constitutional provision absolutely prohibiting the exemption of any property, except enumerated classes, from taxation, any statute attempting either directly or indirectly to exempt from taxation property not within the enumerated classes is void. *Hogg v. Mackay*, 682.
3. CONSTITUTIONAL LAW—COMMUTATION OF TAXES.—A statute which attempts by commutation to relieve a railroad company from the payment of any taxes on its property for a certain period, in consideration of its agreement to carry the troops and munitions of war of the state, free of charge, violates a constitutional provision requiring all taxation to be equal and uniform, and a just valuation of all property to be made for the purpose of taxation, and for this reason such statute is null and void. *Hogg v. Mackay*, 682.

See ADVERSE POSSESSION, 5; MUNICIPAL CORPORATIONS, 10, 13, 18, 20.

TELEPHONE MESSAGES.

See AGENCY, 5.

TELEGRAPH COMPANIES.

FAILURE TO DELIVER CIPHER MESSAGE—MEASURE OF DAMAGES.—The liability of a telegraph company for failure to transmit and deliver a message written in unexplained cipher, or in language unintelligible except to those having a key to its hidden meaning, is for nominal damages, or, at most, for the sum paid as the price for its transmission and delivery. *Western Union Tel. Co. v. Wilson*, 125.

TENANCY.

See COVENANT; LANDLORD AND TENANT.

TENANTS FOR LIFE.

See ESTATE.

TENANTS IN COMMON.

See COVENANT.

TICKETS.

See CARRIERS, 12; RAILROADS, 7-12.

TOOLS.

See EXECUTION, 5.

TORTS.

See HUSBAND AND WIFE, 1.

TOWNS.

See MUNICIPAL CORPORATIONS.

TOWNSHIPS.

See NEGLIGENCE, 2.

TRESPASS.

See EQUITY, 1; INJUNCTION; JURISDICTION, 1.

TRESPASSERS.

See ADVERSE POSSESSION, 3.

TRIAL.

1. SUPPLEMENTAL PETITION—WAIVER OF NOTICE.—A trial court has power to permit a supplemental petition to be filed on such terms as to costs and notice as it may prescribe. When such petition is permitted to be filed during the trial without previous notice, and the opposing party objects to such filing on grounds other than want of notice, and proceeds with the trial without any application for delay, he cannot subsequently complain of want of notice in the absence of any showing of undue advantage. *King v. Hyatt*, 304.
2. NONSUIT, WHEN PROPER.—In the absence of all testimony in support of the material allegations in the complaint, a nonsuit is proper; but when there is any testimony directed to those allegations, the weight, truth, and sufficiency of which are to be determined, the case must go to the jury. *Whitney Mfg. Co. v. Richmond etc. R. R. Co.*, 767.
3. CHANGE OF VENUE—ALLEGATIONS IN DEFENDANT'S AFFIDAVITS FAILURE TO DENY FORMALLY, EFFECT OF.—Whatever right a defendant may have to complain of the failure of the State's attorney to file a formal denial of the allegations in the affidavits of such defendant, taken with a view to the hearing of a motion for a change of venue, will be regarded as waived, if he proceeds to a hearing without objecting to the absence of such denial. *Gitchell v. People*, 147.

4. **CRIMINAL LAW—PERJURY—TRIAL OF, WHEN MUST BE POSTPONED.**—Upon an indictment for perjury alleged to have been committed in verifying affidavits in a civil action, the fact that such action is still pending does not oust the court of jurisdiction to proceed to the trial of the criminal accusation. Whether such prosecution shall proceed while the civil action is undetermined is a question addressed to the sound discretion of the trial court, and its attention should be called to the matter before entering upon the trial of the criminal charge, and an application made to postpone on that ground. *People v. Hayes*, 872.
5. **CONTINUANCE—ABSENCE OF WITNESS.**—An application for a continuance on account of the absence of a witness should not be granted unless the application shows diligence to secure the attendance of the witness, and states definitely the facts expected to be proved by him. *Miller v. State*, 836.
6. **EVIDENCE IMPROPERLY ADMITTED—EFFECT OF WITHDRAWAL OF.**—The effect of withdrawing and excluding evidence erroneously admitted, and which may have been prejudicial in its nature and tendency, is to cure the error, unless such evidence is of such a prejudicial character as to so influence the jury against the defendant that he would be deprived of a fair and impartial trial. *Miller v. State*, 836.
7. **RIGHT TO RECALL JURY AND GIVE ADDITIONAL INSTRUCTIONS.**—In a criminal case the court may, of its own motion, after the jury has retired and before verdict, recall the jurors into open court and give them further instructions whenever it is deemed necessary to do so, provided the defendant is present when such action is taken, or has waived his right to be present. *Benavides v. State*, 799.
8. **RIGHT OF COURT TO RECALL AND PROPERLY INSTRUCT JURY.** Upon the discovery, after the retirement of the jury in a criminal case, of an omission or error in the instructions as given, it is the right of the court to rectify the error by proper instructions, no matter whether such error is discovered by the court, or called to its attention by an exception properly taken by counsel. To this end the jury may be recalled into open court, before verdict, and properly instructed, in the presence of the defendant, whether he objects to such instruction or not. *Benavides v. State*, 799.
9. **EXCEPTION TO INSTRUCTIONS—RECALLING AND PROPERLY INSTRUCTING JURY.**—The defendant may, at any time before verdict, reserve exceptions to the charge of the court as given to the jury, but the bill containing such objections, to be entitled to consideration on appeal, must point out the error or errors complained of with particularity, and not in general terms. *Benavides v. State*, 799.
10. **RIGHT TO RECALL AND INSTRUCT JURY.**—The right of the trial court, of its own motion, to recall the jury in a criminal case before verdict, and to give additional instructions, is not abridged by a statute authorizing the jury to ask further instructions of the court touching any matter of law. *Benavides v. State*, 799.
11. **VERDICT—AFFIDAVIT OF JURORS TO IMPEACH.**—No affidavit, deposition, or other sworn statement of a juror can be received to impeach or explain a verdict, or to show on what ground it was rendered. *Weatherford v. State*, 823.

See APPEAL; NEW TRIAL; WITNESS, 2.

TROVER.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 7.

TRUST DEEDS.

See MERGER; NEGOTIABLE INSTRUMENTS, 6; TRUSTS, 6.

TRUSTS.

1. **TRUST FUNDS—WRONGFUL CONVERSION—RIGHT TO RECOVER.**—The confusion of trust funds wrongfully divested does not entirely destroy the right to follow them. When they are traced into the assets of the unfaithful trustee, or of one who has knowledge of the character of the funds, they become a preferred charge upon the entire assets with which they are mingled, no matter whether such assets consist of money, bills, notes, and land, or other assets. *Myers v. Board of Education*, 263.
2. **TRUST FUNDS—WRONGFUL CONVERSION OF—PREFERENCE OF BENEFICIARY OVER GENERAL CREDITORS OF TRUSTEE.**—When trust money is wrongfully mingled with the funds of a trustee bank, and is used by it in the payment of its debts, after which the bank becomes insolvent, and makes an assignment for the benefit of creditors, the fact that the trust fund went into and swelled the volume of the assets of the bank gives the beneficial owner an equitable right to have his demand first paid out of the assets of the bank before distribution is made to its general creditors, although the trust money is not clearly traceable to any particular asset of the bank, and although its assets consist of money, securities, and lands. *Myers v. Board of Education*, 263.
3. **TRUST FUNDS—MISAPPROPRIATION—TAKING COLLATERAL SECURITY AS AFFECTING RIGHT OF BENEFICIARY TO RECOVER.**—When the trustee of a fund places it in a bank of which he is manager, and the bank, knowing the character of the fund, uses it in paying its own debts, and subsequently becomes insolvent, the fact that the beneficial owner of such fund accepts collateral security from the trustee for its repayment does not prevent the former from recovering the fund from the assets of the bank as against, and in preference to, its general creditors, who are not prejudiced by the taking of the security. *Myers v. Board of Education*, 263.
4. **TRUST FUNDS—MISAPPROPRIATION—RIGHT TO RECOVER AGAINST INSOLVENT TRUSTEE.**—If a trustee places the trust fund in a bank, and the bank, knowing its character, mingles it with its own funds, and, after using it in the payment of its debts, becomes insolvent, and assigns for the benefit of creditors, the beneficiary has a right to recover the trust fund from the assets of the bank in preference to its general creditors, although he fails to present his claim to the assignee for allowance. *Myers v. Board of Education*, 263.
5. **TRUSTS, CONSTRUCTIVE TRUST, PAROL EVIDENCE TO ESTABLISH.**—A conveyance of land made because of the confidential relations between the grantor and the grantee, and without any other consideration than that the grantee shall hold such land in trust for the benefit of the grantor, or, in case of the grantor's death, for the benefit of his daughter, raises a constructive trust which may be established by parol evidence, although the statute of frauds provides that no trusts concerning lands shall be created "unless by act or operation of law, or by deed or conveyance in writing," subscribed by the trustor. *Bowler v. Ourler*, 501.
6. **TRUST DEED.**—NEITHER THE RUNNING OF THE STATUTE OF LIMITATIONS against a debt secured by a trust deed, nor the recovery of judgment on such debt, nor any lapse of time short of the period sufficient to

raise the presumption of payment, deprives the party of his right to enforce the trust for the purpose of compelling payment of the debt. *Green v. Green*, 838.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 4; CORPORATIONS, 20.

USAGE

See RAILROADS, 5.

USURPER.

See OFFICERS, 6.

VARIANCE.

See PLEADING; RAILROADS, 27.

VENDOR AND PURCHASER.

1. A NAKED OPINION TO BUY LANDS IS NOT AN INTEREST THEREIN which a purchaser for value is bound to notice, or which equity will regard. Such a contract is not favored in equity, and the want of mutuality may generally be urged as a bar to its specific enforcement. *Graybill v. Brugh*, 894.
2. TENDER OF DEED.—A vendor of lands is under no obligation to execute a deed until the purchase price is tendered or paid and cannot be put in default without a tender of such price. On the other hand, the vendee from whom the purchase money is due cannot be put in default or subjected to any action therefor unless a deed is first tendered to him. Therefore in an action upon promissory notes, it is a complete defense that they were given for the purchase price of land, and the plaintiff has not tendered or made any conveyance thereof. *Nafziger v. Gregg*, 22.
3. ACTIONS ON—STATUTE OF FRAUDS, PLEA OF, HOW CONSTRUED.—If the statute of frauds is pleaded as a defense to an action on a contract for the sale of lands situated in another state, but there is no averment that the statute so pleaded is the one in force in that state, the intendment will be that the statute in force in the state where the action is brought is referred to, and the plea is consequently bad. *Miller v. Wilson*, 186.
4. STATUTE OF FRAUDS, MEMORANDUM, WHEN SUFFICIENT TO SATISFY.—To meet the requirements of the statute of frauds, it is not necessary that the writing relied upon should be couched in any particular form, but it must contain, either on its face, or by reference to other writings, the names of the parties, vendor and vendee, a sufficiently clear and explicit description of the property to render it capable of being identified, together with the terms, condition (if any), and price to be paid, or other consideration to be given; and it must be signed by the party to be charged, or if signed by an agent, the authority of such agent must be in writing signed by the party to be charged, and the contract or memorandum or note thereof made by the agent must also be in writing and signed by him. *Kopp v. Reiter*, 156.
5. STATUTE OF FRAUDS, WHEN NOT SATISFIED BY UNDELIVERED DEED. Where a contract for the sale of land has been entered into by the husband of the owner, without either written or parol authority from his wife, a deed afterwards executed by her, but never delivered, cannot

be used either to supplement that contract or to show a ratification thereof by her. *Kopp v. Ricker*, 156.

6. **STATUTE OF FRAUDS—UNDELIVERED DEED—MEMORANDUM.**—AN UNDELIVERED DEED executed by the owner of land cannot be resorted to for the purpose of helping out the requirements of the statute of frauds, unless it is a memorandum or note of the contract, or, in other words, refers to the terms and conditions of the contract. *Kopp v. Ricker*, 156.

See DEEDS.

VENDORS' LIEN.

See MORTGAGES, 2.

VENUE.

See APPEAL, 14; TRIAL, 2.

VERDICT.

See TRIAL, 11.

VICE-PRINCIPAL.

See MASTER AND SERVANT, 3.

VOLUNTEER.

See SUBROGATION, 5.

WAGERS.

1. **VALIDITY OF.**—Wagers of all kinds are inconsistent with the established interests of society, in conflict with the morals of the age, and void as against public policy. *Bernard v. Taylor*, 693.
2. **RECOVERY.**—Money or property deposited as a wager on a certain event may be recovered, if demanded by the owner before the event is decided. *Bernard v. Taylor*, 693.

WAGES.

See ATTACHMENT, 1-3; STATUTES, 4.

WAIVER.

See INSURANCE, 6, 7, 12; JURISDICTION, 1; LANDLORD AND TENANT, 19.

WAREHOUSEMEN.

See CARRIERS, 3-5, 7; RAILROADS, 5.

WARRANTY.

See AGENT, 1, 2; CURETSE, 1; PARTNERSHIP, 2; SALES, 5.

WATERS.

1. **MINE DEEDS—DUTY OF MINE-OWNER TO CARE FOR.**—A mine-owner must deposit the refuse matter from his mines on his own land where it will be safe from encroachment by ordinary floods, and if an extraordinary flood should reach and carry away any portion of the refuse so deposited, and leave it on the lands of lower proprietors, the mine-

owner is not liable for the injury so sustained. *Elder v. Lykens Valley Coal Co.*, 742.

2. **MINING DEBRIS—DUTY OF MINE-OWNER TO CARE FOR—LIABILITY FOR NEGLIGENCE.**—A mine-owner has no right to throw the refuse matter from his mine into a stream or to leave it on his own land where ordinary floods will carry it down upon the land of a lower proprietor, and if he does so the injury suffered therefrom is not the natural and necessary consequence of rightful mining but of a want of proper care in disposing of such debris, and for such injury an action will lie. *Elder v. Lykens Valley Coal Co.*, 742.
3. **MINING DEBRIS—LIABILITY FOR INJURY CAUSED BY.**—The owner of coal lands may mine and remove his coal in a proper manner, and, if the drainage from his mines falls into and pollutes a stream of water and injuriously affects lower riparian owners, this fact alone will not impose liability on the owner of the coal. *Elder v. Lykens Valley Coal Co.*, 742.
4. **MINING DEBRIS—LIABILITY FOR NEGLIGENCE IN DUMPING INTO STREAM.** If a mine-owner throws the refuse matter from his mine into a stream where every flood as well as the ordinary current will act upon it and carry it gradually down the stream he is guilty of negligence, and the fact that an extraordinary flood accelerates its descent and gives the final impulse that lodges it on the land of a lower owner will not relieve the mine-owner from liability for the injury thus inflicted. *Elder v. Lykens Valley Coal Co.*, 742.

WILLS.

1. **CONSTRUCTION OF—PRESUMPTION IN FAVOR OF VESTING OF ESTATES.**—The law favors the vesting of estates, and, if possible, construes the terms of a will as creating a vested estate. *Ducker v. Burnham*, 135.
2. **CONSTRUCTION OF.—THE INTENTION OF THE TESTATOR MUST CONTROL** in the interpretation of a will, and, in order to ascertain what that intention is, the whole will and all its parts must be considered. *Ducker v. Burnham*, 135.
3. **REMAINDER, WHETHER VESTED OR CONTINGENT—INTENTION OF TESTATOR.**—Whether limitation creates a vested or contingent remainder may depend upon the intent of the testator, as well as upon the condition of its taking effect. When the devise is to the testator's wife for life, and at her death to such of his children as shall then be living, the benefit does not purport to be conferred on the children as children or individuals named, but as survivors, and this indicates that an immediate vesting is not intended. But where the devise is to the wife for life, with remainder to certain named children, and with a subsequent provision that if any of such named children die before the wife, then the property is to be equally divided between the survivors, the devise of the remainder is to certain definitely specified individuals, who, as remaindermen, already answer the description by which they are to take, and there is no obstacle to supposing an immediate vesting to have been intended. *Ducker v. Burnham*, 135.
4. **EQUITABLE CONVERSION DOES NOT OCCUR UNLESS** there is an imperative direction in the will that land shall be converted into money or money into land. Hence, if the will merely confers upon a designated life tenant the power of disposing of any or all the estate, both real and personal, and the intention of the testator, as gathered from the language of the whole instrument, appears to have been to leave it to

the discretion of such life tenant whether that power shall be exercised, there is no conversion consummated in law until the power conferred has been actually exercised. *Ducker v. Burnham*, 135.

See GIFTS, 3; LEGACY.

WITNESSES.

1. A PERSON ACCUSED OF CONTEMPT OF COURT CANNOT BE COMPELLED to submit to examination as a witness on the hearing of an order to show cause why he should not be adjudged guilty of contempt and punished therefor, if the constitution of the state declares that no person shall be compelled, in any criminal case, to be a witness against himself. *Ex parte Gould*, 57.
2. CONTEMPT OF COURT IS A PUBLIC OFFENSE by the laws of California, punishable by indictment or information, as well as by summary proceedings provided by the code. Therefore, a proceeding to punish a contempt, though it is alleged to have been committed in a civil action, is a criminal action in which the accused cannot be compelled to testify against himself. *Ex parte Gould*, 57.
3. INTEREST, WHEN DISQUALIFIES.—In an action against the sureties of a tenant by the executors of a deceased landlord for the recovery of rent, the tenant is not a competent witness for the sureties, as he is directly interested in the result of the suit. *Gronnes v. St. Paul Trust Co.*, 248.
4. ACTIONS BY OR AGAINST REPRESENTATIVES OF DECEASED PERSONS.—Under the Nevada act of 1881, which provides that "no person shall be allowed to testify . . . when the opposite party to the transaction is dead, or the person, for whose immediate benefit the action or proceeding is prosecuted or defended, is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person," the defendant in a suit by the surviving member of a partnership to foreclose a chattel mortgage cannot be permitted to testify as to a conversation with a deceased member of that partnership, in which he agreed to take certain property in satisfaction of the mortgage. *Gage v. Phillips*, 494.
5. TESTIMONY OF A WITNESS TAKEN AT A FORMER TRIAL may be read in evidence from the stenographer's notes if such witness is absent from the state. *Omaha v. Jensen*, 432.
6. EVIDENCE—HUSBAND AND WIFE—CONFIDENTIAL COMMUNICATIONS BETWEEN.—If a husband willfully gives to a third person letters received from his wife, they are released from the operation of the rule as to confidential communications between husband and wife, and left open to be used as evidence against him to the same extent as if no such rule had ever guarded them. *People v. Hayes*, 572.
7. RAPE—WITNESSES FOR THE DEFENSE, CREDIBILITY OF, HOW IMPRACHABLE.—In a prosecution for rape the state has a right to impeach the defendant's witnesses for truth and veracity, but to allow a question as to their reputation in that regard to be coupled with an inquiry into their reputation for chastity is reversible error, even though the court cautions the jury that only the testimony relating to their truth and veracity is to be considered. *People v. Abbott*, 380.
8. EVIDENCE OF OPINIONS BASED ON EXPERIMENTS.—In an action by the defendant's servant to recover damages for personal injuries caused by the fall of a pile of barrels, which the plaintiff alleges to have

been the result of removing the contents of one of the barrels, and thus diminishing the stability of the pile, it is not error to refuse to allow the defendant's foreman and timekeeper to give evidence of experiments which they have made with a similar pile, from which a barrel placed like the one in question was altogether taken away without causing the pile to fall, nor to exclude the opinions of these witnesses as to whether the stability of such a pile would be affected by taking an empty barrel entirely out of it, or by knocking off the head of a barrel so located and removing its contents. *Libby v. Scherman*, 191.

9. **MINING DEBRIS—NEGLIGENCE IN DISPOSING OF—OPINION EVIDENCE—QUESTION FOR JURY.**—Whether or not a given act is performed in a prudent and proper manner is a subject upon which a witness qualified to speak may express an opinion. But whether or not a given line of conduct, like the management of the refuse matter from a mine, is negligent or careful, is for the jurymen to determine from all the facts before them. *Elder v. Lykens Valley Coal Co.*, 742.
10. **MINING DEBRIS—LIABILITY FOR NEGLIGENCE IN DISPOSING OF—EXPERT EVIDENCE WHEN IRRELEVANT.**—In an action to recover for injuries received from a deposit of mining debris upon the land of a lower proprietor caused by the negligence of a mine-owner, evidence of an engineer that certain retaining walls were built in a proper manner is irrelevant, when it appears that the injury was inflicted by negligently throwing the debris into a stream. *Elder v. Lykens Valley Coal Co.*, 742.
11. **EVIDENCE—INCREASE IN INSURANCE RISK.**—EXPERT EVIDENCE is not admissible to show whether or not an insurance risk is increased by changing a building used as a merchandise store, lighted by coal-oil lamps, to a variety theater, lighted by electricity. *Hahn v. Guardian Ins. Co.*, 709.

See **APPEAL**, 6; **EVIDENCE**; **GIFTS**, 6; **STATUTES**, 2.

WRITS.

See **PROHIBITION**.

WRITS OF REVIEW.

See **CONTEMPT**, 2.

WORDS AND PHRASES.

See **DEFINITIONS**.

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